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Supreme Court, U.S.
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In The

Supreme Court of the United States

DCR INC. and KATHY T. JOHNSON,

Petitioners,

v.

PIERCE COUNTY,

Respondent.

On Petition For A Writ Of Certiorari To The Washington Court Of Appeals, Division II

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. What is the nature of the protection afforded erotic dancing under the First Amendment to the United States Constitution?

2. Does the test for narrow tailoring require the reviewing court to consider the regulation's impact on expression as well as the existence of less burdensome alternatives?

3. Is evidence of economic impact relevant in determining whether adult entertainment regulations afford adequate alternative channels of communication?

4. Does the First Amendment's requirement of reasonable time limits permit issuance of an adult entertainment license to be delayed indefinitely pending the conclusion of building, fire, and zoning inspections?

5. Does the First Amendment's requirement of prompt judicial review following denial of a speech-related license mean a prompt final judicial decision, or simply prompt access to the courts?

RULE 29.6 LISTING

DCR, Inc. has no parent corporation, and no publicly held company owns more than ten percent or more of the corporation's stock.

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PETITION FOR WRIT OF CERTIORARI

DCR, Inc., and Kathy T. Johnson respectfully petition for the issuance of a writ of certiorari to review the judgment of the Washington Court of Appeals, Division II.

OPINION AND ORDER BELOW

The opinion of the Washington Court of Appeals, Division II, is published at 92 Wash. App. 660, 964 P. 2d 380 (1998), and can be found at App. 1. A copy of the order of the Washington Supreme Court denying the petition for review can be found at App. 39.

JURISDICTION

The Washington Court of Appeals, Division II, issued its decision on October 2, 1998. Thereafter, Petitioner timely filed a petition for review with the Washington Supreme Court which was denied on May 5, 1999. This Petition is timely filed within ninety days of that date as provided in Supreme Court Rule 13.3. This Court has jurisdiction to hear the case pursuant to Title 28, United States Code § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In the pertinent part, the First Amendment to the United States Constitution provides: "Congress shall make no law . . . abridging the freedom of speech."

This case involves Ordinance 94-5, the Pierce County adult entertainment ordinance, which is codified as Pierce County Code, (hereinafter PCC), §§ 5.14.010 et seq. PCC § 5.14.070 provides:

> The auditor shall issue an erotic dance studio license within thirty days of receipt of both a properly completed license application and application fee, and upon finding that the business complies with all applicable fire, building, and zoning codes.

PCC § 5.14.180(H) provides:

> All dancing shall occur on a platform intended for that purpose which is raised at least eighteen inches from the level of the floor and no closer than ten feet to any patron.

The remaining portions of Ordinance 94-5 appear beginning at App. 40.

This case also involves the judicial procedures for appealing the denial of a license by statutory writ of certiorari, which are codified in the Washington Revised Code of Washington §§ 7.16.030 through 7.16.140. The relevant statutory sections appear at App. 55.

STATEMENT OF THE CASE

Petitioner DCR, Inc., a Washington Corporation, operates Fox's, a non-alcoholic night club in Pierce County, Washington. Petitioner Johnson is an entertainer who works at Fox's. The business features nude dancing on stage and table dancing by female dancers who are clothed in a bikini. A table dance is an erotic dance

performed in close proximity to the patron and is standard throughout the adult nightclub industry in the United States.

In March, 1994, the Pierce County Council enacted Ordinance 94-5, which amended a previous adult entertainment ordinance. Ordinance 94-5 applies to businesses referred to as "erotic dance studios". Ordinance 94-5 requires studio operators to obtain icenses issued by the County Auditor. PCC 5.14.070 provides:

> The auditor shall issue an erotic dance studio license within thirty days of receipt of both a properly-completed license application, and upon finding that the business complies with all applicable fire, building, and zoning codes.

PCC § 5.14.240(A) provides:

> Any applicant/licensee that has had a license denied, revoked or suspended by the Auditor shall have the right to appeal such action to the Pierce County Hearing Examiner, by filing notice of appeal with the Auditor within ten working days after receiving notice of the action.

PCC § 5.14.240(E) provides:

> The decision of the Hearing Examiner shall be final unless appealed to Superior Court within ten working days from the date the decision is entered by filing an appropriate action and serving all necessary parties.

Ordinance 94-5 contains standards of operation for the business. PCC § 5.14.190(H) provides:

> All dancing shall occur on a platform intended for that purpose which is raised at least eighteen

> inches from the level of the floor and no closer than ten feet to any patron.

Following the enactment of Ordinance 94-5, Petitioners filed suit against Respondent in the Pierce County Superior Court. In the suit, Petitioners alleged that the ban on table dancing contained in PCC § 5.14.190(H) impermissibly curtailed free speech rights and that the license issuance and denial provisions were an impermissible prior restraint. Initially, the suit sought injunctive and declaratory relief under the State Constitution, but the complaint was later amended to include a claim under the Civil Rights Act, Title 42 United States Code § 1983, for violation of the First and Fourteenth Amendments.

Following completion of discovery, Respondent Pierce County moved for summary judgment. In support of its motion, Respondent presented a transcript of the public hearing held before the Pierce County Council. According to the transcript, the ordinance was primarily adopted to prevent sexual contact between entertainers and patrons. According to Deputy Prosecutor Frank Krall, who testified in support of the Ordinance:

> . . . the crux of the problem really is sexual contact between patrons and the dancer. That is the crux of the problem. And this is what the industry calls table dancing, is when you allow dancing off stage.

In opposition to the motion for summary judgment, Plaintiffs presented the deposition testimony of Lieutenant Larry Gibbs, the commander of Pierce Country Sheriff's Special Investigations Unit, which enforced the

predecessor ordinance. The predecessor ordinance permitted table dancing by entertainers wearing bikinis but prohibited physical contact between entertainers and patrons. Lieutenant Gibbs testified that the violations that his unit observed consisted of off-stage exposure of breasts and genitals and sexual contact between patrons and entertainers. There were a few occasions when entertainers were found to have minor quantities of controlled substances in their possession, but his unit observed no narcotics transactions. He testified that there was little evidence that entertainers negotiated with customers to commit acts of off-premises prostitution.

Lieutenant Gibbs testified that the County's efforts to enforce the existing ordinance consisted mainly of criminal prosecution of dancers in Pierce County District Court.[1] These efforts came to a halt after several of the District Court judges ruled that the ordinance did not provide criminal penalties. Respondent made no efforts to solve the problem by amending the ordinance to provide criminal penalties. Although the ruling of the District Court judges had no effect on laws against prostitution, efforts to enforce the prostitution statutes were minimal.

Plaintiffs presented the declaration of Richard Wilson, an attorney familiar with the operational format of adult nightclubs throughout the United States. Mr. Wilson stated in his declaration that, "Virtually all of the clubs that I have seen or am familiar with feature table

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[1] In Washington, the District Courts are the courts of limited jurisdiction which ordinarily hear misdemeanor cases.

dancing as the primary source of revenue for the entertainers". He defined "table dances" as dances that are performed at the customer's table, as opposed to those that are performed on a stage, set back from the audience. He opined that without table dancing, dancers would not be able to earn a living and adult nightclubs would be forced to close.

Plaintiffs also presented the declaration of Steve Fueston, part owner of Papagayo's, an adult nightclub in the city of Bellevue, Washington. Mr. Fueston stated that after his business began compliance with the provision in Bellevue's adult cabaret ordinance requiring entertainers to be separated from patrons by a distance of four feet, entertainers were no longer willing to work there, and the business was forced to close. Plaintiffs presented a similar declaration by Paul Bern, the comptroller for the Deju Vu nightclub in the city of Federal Way, Washington, which began operating at a loss, once it was required to comply with a four-foot separation requirement.

Plaintiffs also submitted the declaration of Dr. Judith Hanna, a cultural anthropologist whose work focuses on culture and dance. Dr. Hanna stated in her declaration that table dances as commonly performed in adult nightclubs are a unique medium of expression. She stated that proximity between entertainer and customer is an expressive component of the table dance. She concluded that the ten-foot separation as contained in Pierce County Ordinance 94-5, "directly and unmistakably effects the content of the erotic message sought to be conveyed by the performer".

Plaintiffs' opposition was also supported by the declaration of Dr. Ed Donnerstein, a social psychologist and Professor of Communications on the faculty of the University of California at Santa Barbara. Dr. Donnerstein conducted an original study on the effect of distance on audience perception of erotic dance performances as commonly performed in adult nightclubs. Based upon the results of this study, Dr. Donnerstein concluded that in the context of erotic dance, distance is an integral part of the dancer's expression and that a ten-foot separation between patrons and performers significantly and substantially deprives the dance of the message that is sought to be conveyed.

The trial court granted Respondent's motion for summary judgment in all respects, and Petitioners appealed directly to the Washington Supreme Court, which remanded the case to the Washington Court of Appeals. The Court of Appeals issued an opinion affirming the judgment of the trial court. App. 1-38. The Court of Appeals holding was based on its determination that "proximity is not an expressive component of erotic dance entitled to protection under the First Amendment or the State Constitution." App. 13. The Court of Appeals also held that consideration of economic impact is irrelevant to a determination of whether there is a First Amendment violation. App. 22-25. The Court of Appeals also construed the licensing provisions to permit the issuance of an erotic dance studio license to be delayed indefinitely pending a determination of compliance with "applicable fire, building and zoning codes", and held that this did not constitute an impermissible prior restraint. App. 31.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ because questions left unanswered by previous decisions of this Court have resulted in confusion and conflicting opinions in the lower courts. Also this Court should grant the writ because the Washington Court of Appeals Division II, decided an important federal question in a way that conflicts with this Court's opinion in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990).

THIS COURT SHOULD GRANT THE WRIT TO ANSWER THE IMPORTANT BUT UNANSWERED QUESTION OF WHAT IS THE NATURE OF FIRST AMENDMENT PROTECTION TO BE EXTENDED TO EROTIC DANCING

In *Barnes v. Glen Theater*, 501 U.S. 560 (1991), this Court issued several divergent opinions in upholding an Indiana Public Indecency Statute against a challenge that its prohibition of nude dancing violated the First Amendment. The lead opinion, written by the Chief Justice and joined by Justices O'Connor and Kennedy, stated that nude dancing is "expressive conduct within the outer perimeters of the First Amendment", and that the statute was constitutional under the four-part test of *United States v. O'Brien*, 391 U.S. 367 (1968). Justice Scalia concurred in the result but would have upheld the statute under the rational basis test because it was a generally applicable statute not aimed at suppressing expression. Justice Souter wrote separately to state that the statute was content neutral not because it was adopted in furtherance of commonly held notions of morality, as the lead opinion suggested, but because it served the purpose

of deterring adverse secondary effects. Justice White, in a dissenting opinion joined by three other members of the Court, held that the statute was not content neutral but rather was aimed at suppressing expression and was therefore invalid under a heightened scrutiny test.

The fractured nature of the *Barnes* decision has led to much confusion as well as divergent results in the lower courts. Courts have questioned whether *Barnes* stands for the proposition that nude or erotic dancing is less protected than other forms of expression. *See, e.g., Colacurcio v. Kent*, 163 F.3d 545 (9th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3008 (June 23, 1999) (No. 98-205).[2] Other courts have read *Barnes* to hold that indeed it is less protected than other forms of expression. *See, Steak House Incorporated v. City of Raleigh*, 166 F.3d 634, 636 (4th Cir. 1999); *Farkas v. Miller*, 151 F.3d 900, 901, 902 (8th Cir. 1998). Courts have also questioned whether the standards for measuring the constitutionality of regulations affecting erotic dancing are to be found in the plurality opinion of the Chief Justice, or the concurring opinion of Justice Souter. *See Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 133, 134 (4th Cir. 1994); *Nakatomi Inc. v. City of Schenectady*, 949 F. Supp. 988 (N.D. N.Y. 1997). One state supreme court found the *Barnes* decision to be so fragmented as to lack discernable controlling precedent, and it therefor adopted the position of the *Barnes* dissent. *Pap's A.M. v.*

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[2] In *Colacurcio*, the Court of Appeals stated, "The fragmented nature of Supreme Court opinions dealing with nude dancing in particular and sexually explicit but non-obscene conduct in general has resulted in a lack of clear guidance on the level of First Amendment protection afforded this type of expression. 163 F.3d at 549.

City of Erie, 553 Pa. 348, 719 A. 2d 273 (1998), *cert. granted*, 119 S. Ct. 1753 (U.S. May 17, 1999) (No. 98-1161).

The confusion arising from *Barnes* extends not only to the level of protection, but also to the determination of precisely what is protected. In holding that the Indiana statute passed constitutional muster because the statutory requirement of pasties and g-string did not significantly diminish the dancer's ability to convey her erotic message, the lead opinion in *Barnes* implies that what is protected is not nude or erotic dancing as typically performed in adult nightclubs, but rather some kind of generic erotic expression. The confusion extends also to the methodology by which a court should decide whether particular expression is or is not deserving of First Amendment protection. At least one court, citing *Barnes*, has suggested that erotic dancing is not protected as a matter of law, but rather the determination is fact-specific depending upon the extent to which the dancing in question is intended by the performer to be communicative of some kind of message. *DLS, Inc. v. Chattanooga*, 107 F.3d 403, 408 (6th Cir. 1997).

Against this background, the Washington Court of Appeals, in upholding the ten-foot set back, that proximity, as an element of the dancer's expression, is not entitled to First Amendment protection, because of the pernicious effects purportedly associated with proximity, and because a dancer can convey her erotic message just as well from ten feet away. *DCR, Inc. v. Pierce County*, 964 P.2d at 288. Moreover, the Court of Appeals arrived at this conclusion on summary judgment without the benefit of testimony or findings, and in the face of uncontroverted evidence presented by Petitioners that

proximity is essential to the erotic message that the dancers are attempting to convey.

In so doing, the Court of Appeals relied on the view suggested in *Barnes* that erotic dancing is to be afforded less protection than other forms of speech. App. 9, 10. It also relied on the plurality's determination in *Barnes*, that the Indiana statute prohibiting total nudity was unrelated to expression because requiring dancers to wear pasties and g-strings only slightly diminishes their ability to convey their message. App. 12. A similar approach was taken by the Ninth Circuit in *Colacurcio v. Kent, supra*, wherein the panel majority held that while table dancing may constitute expression, it is undeserving of First Amendment protection because of the governmental interest in deterring secondary effects.[3]

The net effect of this approach is that the lower courts are free to avoid First Amendment analysis, so long as they determine that the particular mode of expression happens to be associated with secondary effects. Even though the Court of Appeals in this case, and the Ninth Circuit in *Colacurcio*, employed time, place and manner analysis, they could just as easily have dispensed with doing so by concluding that there was no First Amendment freedom at stake. Such an extreme position completely undermines this Court's previous pronouncements extending First Amendment protection to non-obscene, sexually-oriented expression. *See, Roth v.*

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[3] The Court of Appeals stated, "We conclude that table dancing in private nightclubs, with documented links to prostitution and drug dealing, is a highly unlikely candidate for special protection under the First Amendment". 163 F.2d at 555.

United States, 354 U.S. 476 (1954); *Miller v. California*, 413 U.S. 15 (1973). It permits lower court judges to decide on a completely subjective ad hoc basis that some components of the dance are protected, whereas others are not, so long as there is a theoretical opportunity to engage in some type of erotic expression.

The approach taken by the Washington Court of Appeals in this case, which poses a grave threat to freedom of expression, is engendered by the lack of certainty in *Barnes*. This Court should therefor grant the writ to determine the level of protection to be extended to erotic dancing, as well as the important subsidiary questions of what is the standard for judging the constitutionality of regulations which impact erotic dancing, what is the scope of First Amendment protection, and what is the method of analysis that a court should employ in determining whether certain activity falls within the scope of that protection.

THE COURT SHOULD GRANT THE WRIT TO DECIDE THE IMPORTANT BUT UNANSWERED QUESTION OF WHETHER THE REQUIREMENT OF NARROW TAILORING IN THE CONTEXT OF ADULT ENTERTAINMENT REGULATIONS REQUIRES A REVIEWING COURT TO CONSIDER THE IMPACT OF THE REGULATION ON THE EXPRESSION AS WELL AS THE EXISTENCE OF LESS BURDENSOME ALTERNATIVES

In upholding the ten-foot set back, the Washington Court of Appeals applied the time, place and manner test of *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), and *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). Under

this test, a content neutral regulation is valid if it is narrowly tailored to further a substantial governmental interest, and leaves open ample alternative channels of communication. In holding that the ten-foot set back was narrowly tailored, the Court of Appeals failed to consider the existence of less burdensome alternatives that would be equally effective in achieving the legislative goals. Applying only one part of the *Ward* test, the Court of Appeals stated that a regulation is narrowly tailored if "it promotes a substantial interest that would be achieved less effectively absent the ordinance". App. 19. In so doing, the Court of Appeals completely ignored the cautionary statement in *Ward* that a regulation may not "burden substantially more speech than necessary to further the government's legitimate interest." *Ward v. Rock Against Racism*, 491 U.S. at 796.

In contrast, the Ninth Circuit in *Colacurcio* acknowledged that a determination of whether the regulation burdens substantially more speech than necessary is part of the *Ward* test. However, the Ninth Circuit, contrary to *Ward*, improperly cast the burden of demonstrating the effectiveness of less burdensome alternatives on the plaintiff, stating, "Appellants have failed to present evidence showing that a ten-foot rule burdens substantially more speech than necessary to achieve its purpose". *Colacurcio v. Kent*, 163 F.3d at 554.[4]

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[4] *Ward* and other cases consistently place the burden on the government of justifying an asserted content neutral restriction of expression against a facial challenge. *Ward v. Rock Against Racism*, 491 U.S. at 791; *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), ("It was the city's burden to establish a "reasonable fit" between its legitimate interests in safety and

It is beyond contention that the *Ward* test requires a court to find that the regulation does not burden substantially more speech than necessary. *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 218 (1997). The unanswered question is "How is this determination to be made in reviewing regulations which impact adult entertainment?"

This Court has suggested that a regulation which burdens a category ~~of s~~peech not shown to produce secondary effects is not narrowly tailored. *Renton v. Playtime Theatres, Inc.*, 475 U.S. at 52. It has also stated, in the context of commercial speech, that there must be a "reasonable fit" between the legislative interests and the means chosen to serve those interests. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 (1993). This means that the reviewing court must consider the impact of the legislation on protected activity. *Board of Trustees SUNY v. Fox*, 492 U.S. 469 (1989). It also means that while the government is not obligated to demonstrate that the regulation is the least restrictive alternative, the existence of less-burdensome alternatives is a relevant consideration in determining whether the "fit" between the ends and means is reasonable. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. at 416, n.13; *see 44 Liquor Mart v. Rhode Island*, 517 U.S. 484 (1996) (O'Conner, J. concurring).

The Washington Court of Appeals, which ignored the second part of the *Ward* test, held that so long as a regulation is an effective means of achieving the legislative goals, that ends the inquiry. In other words, any

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esthetics and its choice of a limited selected prohibition of newsracks as the means chosen to serve those interests.").

regulation aimed at eradicating secondary effects is acceptable. This approach, which frees the reviewing court from the obligation to determine whether there is a "reasonable fit" between the means and legislative goals, reduces the narrow tailoring requirement to a rational basis test and allows regulations to become so burdensome as to effectively ban the speech.

It is apparent there are outer limits on the sweep of regulations which govern adult entertainment. For example, the fourth prong of the *O'Brien* test provides that the restriction on First Amendment freedoms must be no greater than essential to achieve the asserted governmental interest. *See Barnes v. Glen Theater, Inc.*, 501 U.S. at 567. For the sake of clarity and consistency, this Court should decide what those limits are and whether they require a reviewing court to consider the regulation's impact on the expression as well as the existence of less burdensome alternatives. Obviously, local governments are entitled to great deference in their choice of legislative means. However, there is a point when too much deference becomes abdication of the courts' historic responsibility to safeguard the First Amendment.

THIS COURT SHOULD GRANT THE WRIT TO DECIDE THE IMPORTANT BUT UNANSWERED QUESTION OF TO WHAT EXTENT IS CONSIDERATION OF ECONOMIC IMPACT RELEVANT IN DETERMINING THE EXISTENCE OF ADEQUATE ALTERNATIVE AVENUES OF COMMUNICATION.

In the trial court, Petitioners presented evidence that table dancing is featured in adult nightclubs throughout the United States as the primary form of entertainment

which draws customers to the business, regardless of business format.[5] Petitioners also presented evidence that an adult nightclub with a format similar to that of DCR was forced to close when a local government adopted an ordinance prohibiting table dancing, because customers were no longer willing to patronize the business and entertainers were no longer able to earn a living. In upholding the ten-foot set back, the Washington Court of Appeals held that Petitioners' evidence of financial impact was irrelevant, stating:

> In *Playtime Theatres*, the United States Supreme Court held that the action of the market does not limit alternative avenues of communication; only government's prevention of entry into the market can be characterized as limiting such alternatives.

App. 22.

The Washington Court of Appeals also noted that, "in the context of adult businesses, lower federal courts have consistently rejected financial feasibility in determining whether alternative avenues of expression are available". App. 24. This description of the holdings in the federal courts is to an extent overblown. The diversity of opinion in the federal courts of appeal suggests that there is a degree of uncertainty as to how this Court's decision in *Renton* governs the lower courts' ability to consider evidence of economic impact.

In *Spokane Arcade, Inc. v. City of Spokane*, 75 F.3d 663, 665 (9th Cir. 1996), the Ninth Circuit drew a distinction

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[5] See Richard Wilson Declaration at App. 60.

between economic factors which bar entry into the market, and those that insure success within the market. Only the former factors are cognizable in determining the existence of a First Amendment violation. Thus, according to the Ninth Circuit, economic factors amounting to an absolute bar to market entry would result in a First Amendment violation, whereas factors that merely render a business unable to earn a profit, have no significance at all. In *Colacurcio v. Kent*, the Ninth Circuit applied the market entry test to a regulation similar to the one adopted by the Respondent and held that the plaintiffs' proof was insufficient because they failed to show they would be unable to profitably operate the business under some other type of format. 163 F. 3d at 556.

In *Woodall v. City of El Paso*, 49 F.3d 1120 (5th Cir. 1995), the Fifth Circuit held with respect to an adult zoning regulation that "commercial viability is not a factor" under *Renton*, but that " . . . land cannot be found to be reasonably available if its physical or legal characteristics make it impossible to locate there." 49 F.3d at 1122, 1123. However, the Court acknowledged that economic factors play a role in determining whether land is physically unavailable, stating, "Physical availability may be thought of in terms of the cost of altering or developing the area to change its physical characteristics to make it suitable for some generic commercial enterprise". *Id.* at 1123.

In analyzing the financial impact of a six-foot buffer between entertainer and patron, the Sixth Circuit, in *DLS, Inc. v. City of Chattanooga*, stated:

> . . . we consider the economic effects of the ordinance in the aggregate, not at the individual level; if the ordinance were intended to destroy the market for adult cabarets, it might run afoul of the First Amendment, but not if it merely has adverse effects on the individual theater.

107 F.3d at 412.

The inability of the courts of appeal to articulate a precise and consistent standard for determining how to consider economic impact illustrates the need for clarification by this Court. In regard to this issue, it is respectfully suggested that the Ninth Circuit's distinction between economic bars to market entry and economic factors contributing to success within the market is totally meaningless. For example, there is no practical difference between a regulation that tells theatre owners that they may not charge for tickets and one that tells them they may only show black and white movies every other Thursday on a two-inch screen.

The lower court cases suggesting the irrelevance of economic factors are unfaithful to the holding in *Renton*. In *Renton*, this Court disposed of the theater owner's economic impact argument by stating there is no constitutional violation if theater owners are required "to fend for themselves in the commercial real estate market, on equal footing with other prospective purchasers". 475 U.S. at 54. This Court went on to observe that the First Amendment does not "compel the Government to ensure that adult theaters, or any other kind of speech related business, for that matter, will be able to obtain sites at bargain prices". *Id.* However, to suggest that adult uses should not be given a special advantage because of their

protected status is something quite different from saying that economic impact is never relevant at all.

This Court has recognized that there is a relationship between economics and freedom of speech. For example, it did so in striking down that portion of the Ethics in Government Act which prevented government employees from receiving honoraria. *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454 (1995). It did so in invalidating statutory limits on the amounts that political candidates could spend on their campaigns. *Buckley v. Valeo*, 424 U.S. 1 (1976). The relationship between economics and speech is just as prevalent in the arts and in the entertainment industry where the peoples' ability to earn a living in their chosen field dictates for all practical purposes whether they are able to engage in the speech.

This Court needs to fashion a standard which allows for reasonable consideration of economic impact. While Adult nightclubs are not entitled to any special advantage, this Court should not turn a blind eye to economic reality to the point that local governments are free to impose a censorship system under the guise of regulation.

THIS COURT SHOULD GRANT THE WRIT BECAUSE THE WASHINGTON COURT OF APPEALS IGNORED DECISIONS OF THIS COURT WHEN IT HELD THAT THERE CAN BE INDEFINITE DELAYS IN THE ISSUANCE OF AN EROTIC DANCE STUDIO LICENSE, PENDING THE OUTCOME OF FIRE, BUILDING, AND ZONING INSPECTIONS

PCC § 5.14.060 provides:

> Within seven days of receipt of an application for an erotic dance studio license, the Auditor

> shall transmit copies of such application to the Sheriff for review and recommendation, and to the Fire Prevention Bureau and the Planning and Land Services Department for review and report as to the Applicant's compliance with all applicable fire, building, and zoning requirements of the Pierce County ordinance.

PCC § 5.14.070 provides:

> The Auditor shall issue an erotic dance studio license within thirty days of receipt of both a properly-completed application and application fee, *and upon finding that the business complies with all applicable fire, building and zoning codes,* (emphasis supplied).

Petitioners challenged this section as an impermissible prior restraint in that it allowed for indefinite delays in the issuance of a license, contrary to *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990). In response, the Washington Court of Appeals construed PCC § 5.14.070 as follows:

> Although the above language is not a model of clarity, the only logical construction is that the Ordinance requires the auditor to make a licensing decision within thirty days of receipt of a complete application and fee, *where it is readily ascertainable that the business complies with safety codes and zoning restrictions*. But where, for example, the building or proposed seating arrangements violate the fire code, then the license would issue within thirty days after such violations were shown to have been corrected. Similarly, if the complete application proposed an erotic dance studio in a zone in which such

> business was prohibited or restricted, the auditor would issue a license within 30 days after either removal of the zoning restriction or a change in location to a zone in which this business is a permitted use. *Such construction renders the Ordinance constitutional.*

App. 31 (emphasis supplied).

This Court in *FW/PBS* recognized there are "two evils" associated with speech-related licensing schemes. One occurs when unbridled discretion is placed in the hands of the licensing official. 493 U.S. U.S. at 225. The second occurs when there are no time limits within which the decisionmaker must issue the license. *Id.* This Court stated, "Where the licensor has unlimited time within which to issue the license, the risk of arbitrary suppression is as great as the provision of unlimited discretion". 493 U.S. at 226. Hence, a licensing scheme that fails to set reasonable time limits is an impermissible prior restraint.

The Respondent's licensing scheme is almost identical to the licensing scheme ruled unconstitutional in *FW/PBS*, due to the failure to contain reasonable time limits. In that case, the chief of police was required to issue a license within thirty days after receipt of application, provided that the license for sexually-oriented businesses was not to be issued if the business had not been approved by the health department, fire department and building official as being in compliance with applicable codes and regulations. The ordinance failed to contain time limits within which these inspections were to occur and there was no way by which the applicant could ensure completion of the inspections within the 30-day

time period. The ordinance violated the First Amendment because it allowed for indefinite delay.

Similarly, the Pierce County ordinance makes issuance of the license contingent on administrative inspections to ensure compliance with fire, building, and zoning codes. There are no time limits for completion of these inspections, and the applicant has no means by which to ensure issuance of the license within the thirty day time limit in PCC § 5.14.070. The Court of Appeals attempted to distinguish *FW/PBS* by suggesting that the license would issue within the thirty days if compliance with applicable codes is "readily ascertainable", but it leaves local officials with the discretion to decide whether code compliance is "readily ascertainable" or not. Should they decide that the violation is not "readily ascertainable", then there are no time limits for completion of the administrative inspections and no time limits within which the license must be issued.

This case is directly governed by *FW/PBS*, notwithstanding artful efforts by the Washington Court of Appeals to circumvent that decision. Since the Court of Appeals decision directly conflicts with an opinion of this Court, the Court should grant the writ and consider per curiam reversal. *See, Thompson v. Louisiana*, 469 U.S. 17 (1984).

THE COURT SHOULD GRANT THE WRIT BECAUSE THERE IS A CONFLICT IN THE LOWER COURTS AS TO WHAT CONSTITUTES ADEQUATE JUDICIAL REVIEW FOLLOWING DENIAL OR NON-RENEWAL OF A SPEECH-RELATED LICENSE

According to this Court's decision in *FW/PBS*, the safeguards necessary to prevent an impermissible prior

restraint are reasonable time limits for issuance of the license, during which time the status quo is preserved, and prompt judicial review. 493 U.S. at 227. The Washington Court of Appeals held that the requirement of prompt review was satisfied by the provision for an administrative stay of the auditor's decision, pending judicial review. The Court stated:

> Because the Ordinance provides for a stay of an adverse administrative determination, it assures that an applicant's ability to exercise constitutionally protected rights of expression are not unreasonably restrained. By thus preserving the status quo, DCR is not harmed by an adverse decision, (cite omitted). It is therefore irrelevant that the Ordinance does not place a time limit on the hearing examiner's decision.

DCR, Inc. v. Pierce County, App. 33.

The Washington Court of Appeals was incorrect because, in the case of license denial or non-renewal, the administrative stay provided in the ordinance does not allow the business to be open; it simply stays the decision of the auditor. The license expires automatically at the end of each calendar year. *See*, PCC § 5.14.160. Therefore, in the case of non-renewal, or denial, the status quo is that the business is closed regardless of whether the auditor's decision is stayed. This, coupled with the absence of prompt administrative and judicial review, results in an impermissible prior restraint.

In the event of license denial or non-renewal, the Ordinance provides for an appeal to the hearing examiner. *See*, PCC § 5.14.240(A). The hearing examiner is required to hold the hearing within ninety days after the

appeal is filed. *Id.* In the event of an unfavorable decision by the hearing examiner, judicial review may be sought by petitioning the superior court for a writ of review pursuant to Wash. Rev. Code § 7.16.040 et seq. *Chausee v. Snohomish County*, 689 P.2d 1084 (Wash. App. 1984). The writ, once it is issued, simply commands the lower tribunal to certify the record to the superior court. *See* Wash. Rev. Code § 7.16.070. Upon the return of the writ, the superior court is required to conduct a hearing. *See* Wash. Rev. Code § 7.16.110. However, there is no time limit within which the judicial hearing must occur and no time limit within which the Court must make a decision. *Id.*

There is a divergence in the lower courts as to what satisfies the requirement of prompt judicial review. In *Baby Tam & Co. Inc. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998), the Ninth Circuit noted a disagreement in the circuits and held that the *FW/PBS* requirement of prompt judicial review did not simply mean prompt access to the court, it meant a prompt judicial hearing. The Court stated:

> We reject the view of the Fifth and Seventh Circuits that mere access to judicial review is sufficient. As the Seventh Circuit acknowledged in *Graff*, "a person always has a judicial forum when his speech is allegedly infringed", (cite omitted). Thus, to hold that mere access to judicial review fulfills the second *Freedman* safeguard makes the safeguard itself meaningless. *We conclude that "prompt judicial review" means the opportunity for a prompt hearing and a prompt decision by a judicial officer.*

154 F.3d at 1101 (emphasis added).

Cases which hold that prompt judicial review simply means prompt access to the court's include *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 709 (5th Cir. 1994); *Graff v. City of Chicago*, 9 F.3d 1309, 1324-25 (7th Cir. 1993); and *World Wide Video v. Tukwila*, 815 P.2d 18, 23 (Wash. 1991). In addition to *Baby Tam v. City of Las Vegas*, cases which hold that prompt judicial review means a prompt final judicial hearing and decision include *11126 Baltimore v. Prince George's County, Md.*, 58 F.3d 988 (4th Cir. 1995); and *East Brook Books, Inc. v. City of Memphis*, 48 F.3d 220, 225 (6th Cir. 1995).

The view requiring a prompt final judicial decision is more faithful to this Court's opinion in *FW/PBS*. There, this Court adhered to its earlier decision in *Freedman v. Maryland*, 380 U.S. 51 (1965), and held that, "The core policy underlying *Freedman* is that the license for a First Amendment protected business must be issued within a reasonable period of time, *because undue delay results in the unconstitutional suppression of protected speech.*" 493 U.S. at 227 (emphasis supplied). The dangers of delay are just as present with untimely judicial review following license denial as they are with failure of the licensing official to promptly act on the license application. In either case, government officials may be able to frustrate the exercise of First Amendment rights simply by dragging their feet for as long as possible. In either case, the delay has a "chilling effect", and those seeking to exercise their First Amendment rights may forgo the opportunity to do so, rather than endure an indefinite waiting period.

This Court should grant the writ to resolve the conflict in the lower courts and because the Washington Court of Appeals held that the Respondent's licensing

scheme did not constitute an impermissible prior restraint, in direct contravention of this Court's decision in *FW/PBS*.

CONCLUSION

This case comes before this Court against a background of uncertainty as to the meaning of this Court's major decisions dealing with adult entertainment. Throughout the country, local governments have interpreted this uncertainty as a "wink and a nod" enabling them to do indirectly through ever more burdensome regulations what this Court has said they may not do directly, namely, impose a ban on non-obscene sexually oriented expression. This Court's historic protection of unpopular forms of expression, such as adult entertainment, establishes a bulwark against all forms of government censorship. This Court should not permit that bulwark to be weakened by lack of clarity in its decisions. Petitioners therefore respectfully request that this Court grant the writ to review the judgment of the Washington Court of Appeals.

Respectfully submitted

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APPENDIX

DCR, INC., a Washington corporation; and Kathy T. Johnson, Appellants.

v.

PIERCE COUNTY, Respondent.

No. 21416-4-II.

Court of Appeals of Washington, Division 2.

October 2, 1998.

Gilbert H. Levy, Seattle, for Appellants.

Frank H. Krall, Pierce County Prosecutors Office, Tacoma, for Respondent.

Stephen A. Smith, Preston Thorgrimson et al., Seattle, Amicus Curiae on behalf of Cities of Lakewood & Kent et al.

HUNT, Judge.

An adult entertainment corporation and a dancer challenge the constitutionality of a Pierce County (the County) ordinance regulating erotic dance studios. DCR, Inc., and table dancer Kathy Johnson (DCR) appeal the trial court's dismissal of their lawsuit on the County's motion for summary judgment. Finding no unconstitutional restraint on protected expressive conduct, we affirm.

I

BACKGROUND

A. The Current Ordinance

Pierce County, Wash. Ordinance 94-5 (1994), codified as Pierce County Code (PCC) sec. 5.14 (1994) (the

Ordinance), regulates erotic dance studios, managers, dancers, and employees. Its stated purpose is to eliminate the "historical" and regular occurrence of "prostitution, narcotics, breaches of the peace, and the presence within the industry of individuals with hidden ownership interests and outstanding arrest warrants." Ordinance 94-5.

Section 5.14.010(D) defines "erotic dance studio" and thus determines which businesses must comply with the Ordinance.[1] Sections 5.14.030 through .090 establish licensing requirements for operators. Sections 5.14.100 through .170 establish licensing requirements for managers and dancers. Sections 5.14.220 and .230 establish standards for denial and revocation of licenses. Section 5.14.190(H) requires all dancing to occur on a platform raised at least 18 inches from the floor and no closer than 10 feet to any patron. Sections 5.14.190(K) and (L) prohibit direct tipping. Section 5.14.250 imposes penalties for violations of the Ordinance.

B. Enforcement Problems with Former Ordinance

The County presented evidence that law enforcement authorities conducted investigations in 1992 and 1993, which revealed erotic dance studio[2] problems with prostitution, narcotics transactions, and sexual contact. The sexual contact included: mutual fondling; dancers sitting

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[1] PCC sec. 5.14.010(D) states: " 'Erotic dance studio' means a fixed place of business which emphasizes and seeks, through one or more dancers, to arouse or excite the patrons' sexual desires."

[2] Fox's, New Players, Deja Vu, RB's Show Bar, and another business now known as Lipstix.

on customers' laps while simulating intercourse; dancers rubbing customers' faces, legs, and genitalia with their own genitalia and breasts; customers orally contacting the dancers' breasts and genitalia, including inserting monetary tips into the dancers' vaginas by mouth; and customers digitally penetrating the dancers' vaginas. With the club owners' knowledge, prostitution occurred between dancers and customers both inside and outside the premises. Narcotics transactions were prevalent and included the sale of cocaine and methamphetamines.

The County also presented evidence that erotic dance studio operators and performers ignored the former ordinance's prohibition of physical contact between dancers and customers, because such contact was lucrative and courts were lenient. Narcotics violations were difficult to curb because police could not find dancers willing to work undercover, for fear of retribution from club owners.

C. Summary Judgment

DCR, Inc., which operates an erotic dance studio called Fox's, and one of Fox's employees, dancer Kathy Johnson, filed suit to have the current Ordinance declared unconstitutional, to enjoin the County from enforcing the Ordinance, and to obtain damages. The County moved for summary judgment dismissal.

In support of its motion for summary judgment, the County presented a transcript of the Pierce County Council public hearing. At this hearing, law enforcement officers testified concerning sexual contact between patrons and dancers at adult nightclubs in Pierce County. In a

declaration, Pierce County Sheriff's Lieutenant Larry Gibbs stated that he had personally observed the occurrence of sexual contact in adult entertainment studios and that the 10-foot setback between entertainers and patrons "will greatly reduce the number of occurrences of illegal sexual conduct."

The County presented a video tape depicting sexual contact at two adult nightclubs in Pierce County. It also presented crime statistics indicating the number of occasions on which entertainers had been charged with violating the existing adult entertainment ordinance. The County presented arrest reports and police reports documenting such violations.

DCR presented evidence that many adult nightclubs throughout the country, including Fox's, feature nude or semi-nude dancing on stage and on tables. The clubs charge an admission fee and sell non-alcoholic drinks. The dancers are not employees of the business but instead pay rent to the business for using space on the dance floor. Table dancers are paid directly by the customers. Dancers testified that the Ordinance would deprive them of the ability to earn a living. The business derives some revenue from entrance fees and the sale of beverages, but the primary source of revenue is rent from the dancers.

DCR presented the declaration of Steve Fueston, part owner of Papagayo's, an adult nightclub in the City of Bellevue. Fueston stated that after his business began complying with Bellevue's four-foot minimum distance

restriction for adult cabarets,[3] entertainers were no longer willing to work there and the business was forced to close. DCR also presented the declaration of Paul Bem, comptroller for the Deja Vu nightclub in Federal Way, which began operating at a loss once it complied with Federal Way's four-foot separation requirement for adult entertainment.

To support its contention that the Ordinance will destroy the market for alcohol-free erotic dance clubs, DCR submitted Richard Wilson's declaration that prohibition of table dancing will eliminate the market for such clubs. Wilson is an attorney who has represented several adult nightclubs across the United States. He has been a legal and business consultant for several adult entertainment companies, is familiar with the business format of many clubs featuring live adult entertainment, and has spent considerable time in such clubs. His declaration states:

> Based on my experience in the industry, as well as my personal knowledge, it is my opinion and belief that table dancing is the primary entertainment activity provided by adult nightclubs, and that attracts customers to the clubs. Without table dances, entertainers would not be able to earn a living, and adult nightclubs would suffer seere [sic] financial losses and be forced to close,

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[3] The Bellevue ordinance imposes a four-foot distance requirement for clothed individual table dances, but requires all nude or semi-nude dances to be performed at least eight feet from customers on an 18-inch raised platform. *Ino Ino v. City of Bellevue*, 132 Wash.2d 103, 110-11, 937 P.2d 154 (1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 856, 139 L.Ed.2d 755 (1998).

thus terminating their presentation of entertainment which is protected by the First Amendment.

The Pierce County Superior Court held the Ordinance constitutional as a matter of law, granted summary judgment to the County, and dismissed the case.

D. Appeal

On appeal, DCR and Johnson claim the trial court erred in summarily dismissing their case, because there are genuine issues of material fact concerning the constitutionality of Pierce County Ordinance 94-5, involving the First, Fifth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 3 and 5, of the Washington Constitution. Specifically they argue that: (1) the 10-foot rule will force all erotic dance clubs out of business; and (2) a rule that thus destroys the market for erotic dancing is unconstitutional.

II

ANALYSIS

A. Summary Judgment

A trial court may dismiss a case on summary judgment if the moving party establishes that there are no genuine issues of material fact. *Olympic Fish Prods., Inc. v. Lloyd*, 93 Wash.2d 596, 602, 611 P.2d 737 (1980). On review, we determine whether the affidavits, facts, and record have created an issue of fact and, if so, whether it is material. *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wash.2d 1, 12, 721 P.2d 1 (1986). We view the

evidence and offers of proof in the light most favorable to the non-moving party. *Wilson v. Steinbach*, 98 Wash.2d 434, 437, 656 P.2d 1030 (1982). Construction of an ordinance[4] and whether certain conduct is constitutionally protected are questions of law,[5] which we review de novo.

B. Regulation of Distance Between Dancer and Patron

Pierce County Code Section 5.14.190(H) requires all erotic dancers to perform on a stage 18 inches high and 10 feet from the closest patron.[6] DCR contends that this restriction violates free speech rights and infringes on its right to substantive due process. More specifically, DCR argues that: (1) the 10-foot rule effectively bans table dancing and does not leave open "practically available" alternative avenues of communication; (2) allowing dancers to perform on stage is not a comparable alternative; and (3) no one will pay to see erotic dancers on a stage 10 feet away, as compared to nearby on table tops. DCR contends that the Ordinance thus constitutes an unconstitutional prior restraint, the effect of which will be eradication of the erotic dance studio market.

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[4] *Rettkowski v. Department of Ecology*, 128 Wash.2d 508, 515, 910 P.2d 462 (1996); *Trueax v. Ernst Home Ctr., Inc.*, 70 Wash.App. 381, 853 P.2d 491 (1993), *rev'd on other grounds*, 124 Wash.2d 334, 878 P.2d 1208 (1994).

[5] *Dicomes v. State*, 113 Wash.2d 612, 624, 782 P.2d 1002 (1989).

[6] "All dancing shall occur on a platform intended for that purpose which is raised at least eighteen inches from the level of the floor and no closer than ten feet to any patron." PCC sec.5.14.190(H).

A governmental attempt to restrict the content of future speech, deemed "prior restraint," bears "a heavy presumption against its constitutional validity" under the First Amendment to the federal constitution, and unconstitutional per se under Article I, Section 5, of the state constitution. *JJR Inc. v. City of Seattle*, 126 Wash.2d 1, 6 n. 4, 891 P.2d 720 (1995) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 1963)). But "a regulation may not rise to the level of a prior restraint if it merely restricts the time, place, or manner of expression." *Ino Ino, Inc. v. City of Bellevue*, 132 Wash.2d 103, 126, 937 P.2d 154 (1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 856, 139 L.Ed.2d 755 (1998) (citing *State v. Coe*, 101 Wash.2d 364, 373, 679 P.2d 353 (1984)). The threshold question here is whether table dancing is constitutionally protected expressive conduct.

1. Dance as Expression

> In an abstract sense, all conduct "expresses" something. That alone cannot justify treating all conduct as speech. As the Supreme Court explained in *City of Dallas v. Stanglin*, [490 U.S. 19, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989)], while freedom of speech "means more than simply the right to talk and to write," it does not embrace all human activity. "It is possible," the Court observed, "to find some kernel of expression in almost every activity a person undertakes for example, walking down the street, or meeting one's friends at a shopping mall but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."

1 Rodney A. Smolla, Smolla and Nimmer on Freedom of Speech, sec. 11.3, at 11-5 (3d Ed.1997) (footnotes omitted).

Nude dancing "receives constitutional protection, although nudity itself is conduct subject to the police powers of the state." *Ino Ino,* 132 Wash.2d at 125, 937 P.2d 154. Contrary to DCR's position, the Washington Supreme Court recently held that "the differences in texts of art. I sec. 5, [of the state Constitution] and the First Amendment" do not "justif[y] greater state constitutional protection in the context of sexually explicit nude and seminude dancing."[7] *Ino Ino,* 132 Wash.2d at 119-20, 937 P.2d 154. Courts have acknowledged that "[n]ude dance . . . is afforded lesser protections than other types

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[7] In reaching this conclusion, the court first analyzed the *Gunwall* factors relative to nude dancing. *State v. Gunwall,* 106 Wash.2d 54, 61- 62 720 P.2d 808, 76 A.L.R.4th 517 (1986), cited in *Ino Ino,* 132 Wash.2d 103, 937 P.2d 154. Its *Gunwall* analysis did not cause the court to change its view of nude dancing in the context of free speech protections. After weighing the *Gunwall* factors, the court concluded that greater protection was not warranted under the state constitution. *Ino Ino,* 132 Wash.2d at 116-22, 937 P.2d 154.

Specifically, the first *Gunwall* factor, the text of Article I, Section 5, did not require greater protection of nude dancing because nude dancing is "expression" and the Constitution's text refers only to speech and writing. *Ino Ino,* 132 Wash.2d at 117, 937 P.2d 154. Nor did the fourth factor, preexisting state law, require greater protection because our state has a history of outlawing or severely restricting nude dancing. *Ino Ino,* 132 Wash.2d at 120-21, 937 P.2d 154. For the same reason, i.e., historically strict local regulation, the sixth factor, local concern, did not warrant greater protection under our state constitution. *Ino Ino,* 132 Wash.2d at 122, 937 P.2d 154.

of speech, such as political speech." *See DFW Vending, Inc. v. Jefferson County*, 991 F.Supp. 578, 590 (E.D.Tex., 1998) (citations omitted). Rather nude dancing is expression that " 'clings to the edge of constitutional protection.' " *Ino Ino*, 132 Wash.2d at 116, 937 P.2d 154 (quoting *JJR*, 126 Wash.2d at 9, 891 P.2d 720). Although arguably "expressive," illegal conduct associated with table dancing, such as customers' digital penetration, oral copulation, and insertion of tips into dancers' orifices,[8] falls outside this edge of constitutional protection.

The issue here is whether proximity of the erotic dance, as contrasted to the movements of the dance, constitutes communicative "expression" in the nature of constitutionally protected speech, or whether it is unprotected mere conduct. The evidence adduced by the County established that proximity of table dancers to customers promotes lucrative illegal conduct, and that a predecessor ordinance prohibiting such illegal conduct in adult entertainment businesses was ineffective.

The majority in *Ino Ino* noted that Bellevue's four-foot rule "does regulate expression" but did not squarely address whether table dancing near customers is constitutionally protected conduct, differing materially from

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[8] DCR has not asserted that such activities have an "expressive" element. In any case, even if these pernicious secondary-effects had expressive elements, "intentional contact between a nude dancer and a bar patron is conduct beyond the expressive scope of the dancing itself." *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1253 (5th Cir. 1995). "The conduct at that point has overwhelmed any expressive strains it may contain." *Hang On*, 65 F.3d at 1253 (upholding "no touch" ordinance in nude dancing establishment).

more distant stage dancing.[9] *Ino Ino*, 132 Wash.2d at 125, 937 P.2d 154. But the court did note that the "eight-foot requirement limits only proximity and does not restrict the expressive aspect of stage dancing. . . . " *Ino Ino*, 132 Wash.2d at 132, 937 P.2d 154. Thus the court implies that the proximity component of dancing is mere conduct that is not constitutionally protected. *Ino Ino*, 132 Wash.2d at 132, 937 P.2d 154. The court rejected a prior restraint analysis and instead found the four-foot distance requirement between dancer and patron to be a reasonable time, place, and manner restriction. The court ruled that the four-foot rule does not ban the expression of table dancing, but rather "allows dancers to engage in all types of movement, with the exception of pure sexual conduct, in order to convey eroticism." *Ino Ino*, 132 Wash.2d at 130, 937 P.2d 154.

This reading of *Ino Ino* conforms to federal constitutional law, which *Ino Ino* acknowledges is consistent with state constitutional law regarding the extent to which free speech protection applies to sexually explicit or nude dancing. For example, Chief Justice Rehnquist, writing for the plurality in *Barnes v. Glen Theatre*, reasoned that requiring nude dancers to wear pasties and G-strings

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[9] The Bellevue ordinance at issue in *Ino Ino* included two distance requirements: (1) a four-foot distance between dancers and patrons during individual performances (such as table dancing); and (2) an eight-foot distance between stage dancers and patrons. Moreover, all nude or partially nude dancing was required to be at least eight feet from the nearest member of the public on a stage at least 18 inches above the floor. *Ino Ino*, 132 Wash.2d at 132 n.8, 937 P.2d 154 (citing BCC sec. 5.08.070(A)(1), (6) (1995)).

does not deprive the dance of is [sic] erotic message, but rather "simply makes the message slightly less graphic." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 571, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991). Similarly in *Colacurcio v. City of Kent*, 944 F.Supp. 1470 (W.D.Wash.1996),[10] a local federal court noted that table dancing provides customers with a "more intense, more personal, more erotic" experience because the customer can see and hear the dancer more clearly and has better opportunity to smell the "breath, perfume and the scent of the body." *Colacurcio*, 944 F.Supp. at 1476. Nevertheless, the court ruled that

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[10] In *Colacurcio v. City of Kent*, 944 F.Supp. 1470, 1476-77 (W.D.Wash.1996), an adult entertainment corporation contended that a 10- foot setback was unconstitutional because it banned table dancing. The federal district court agreed that the 10-foot setback baned [sic] table dancing, but nevertheless concluded that the ban did not violate the First Amendment of the federal constitution because it left open alternative avenues of communication: It still allowed dancers to perform on stage.

The court noted that the proper focus is not on the customer's experience but on the dancer's ability to express herself. The court found that the rule did "not prevent the dancers from performing their erotic dance, or limit the manner in which the dancers may express themselves." *Colacurcio*, 944 F.Supp. at 1477. Since dancers could still perform their erotic dances, the court analyzed the regulation as a reasonable time, place, and manner restriction. *Colacurcio*, 944 F.Supp. at 1477.

Similarly, in upholding a 10-foot setback and direct tipping prohibition in *Kev, Inc. v. Kitsap County*, 793 F.2d 1053 (9th Cir. 1986), the Ninth Circuit Court of Appeals focused on the dancer's ability to express herself rather than on the customer's erotic experience, noting: "While the dancer's erotic message may be slightly less effective from ten feet, the ability to engage in the protected expression is not significantly impaired." *Kev*, 793 F.2d at 1061.

"there is nothing in [federal] constitutional jurisprudence to suggest that patrons are entitled under the First Amendment to the maximum erotic experience possible." *Colacurcio,* 944 F.Supp. at 1476.

Here, the 10-foot distance requirement diminishes the erotic experience because customers cannot smell the breath, perfume, and scent of the body or touch the dancer's body so intensely as they can with close-quarters table dancing. The 10-foot rule minimizes opportunity for illegal activities, which are not protected conduct. But the 10-foot rule does not restrict expressive content of the dance itself: The dancer can perform the same dance 10 feet away. "Indeed, that distance is closer than distances at which artistic dance performances at theaters and concert halls generally are viewed. An eighteen-inch elevated platform only enhances visibility." *DFW Vending,* 991 F.Supp. at 594. Reiterating *Colacurcio,* there is no constitutional entitlement to the "maximum erotic experience possible." *Colacurcio,* 944 F.Supp. at 1476.

We therefore hold that proximity is not an expressive component of erotic dance entitled to protection under either the First Amendment or the State Constitution.

Having found that proximity of table dancing is not constitutionally protected expression, aside from performance of the dance itself, we need not address DCR's prior restraint argument. Nevertheless, because *Ino Ino* considered a prior restraint analysis before rejecting it and because the Ordinance does regulate the place or manner of erotic dance by controlling the distance

between dancer and patron, we present the following additional analysis.

2. Prior Restraint

"A prior restraint is an administrative or judicial order forbidding communications prior to their occurrence. Simply stated, a prior restraint prohibits future speech, as opposed to punishing past speech." *Soundgarden v. Eikenberry*, 123 Wash.2d 750, 764, 871 P.2d 1050, 30 A.L.R. 5th 869 (1994) (citation omitted). If an ordinance constitutes a "prior restraint" on protected speech, the Washington Constitution confers greater protection than the Federal Constitution. *Ino Ino*, 132 Wash.2d at 122, 937 P.2d 154. But "[i]n the context of adult entertainment- . . . the court has declined to afford the full protection of art. I, sec. 5" to "expressive conduct or sexually explicit dance." *Ino Ino*, 132 Wash.2d at 117, 937 P.2d 154.

DCR contends that the 10-foot setback is a prior restraint under the Washington Constitution, arguing that Article I, Section 5 offers greater protection to nude table dancing. The Washington Supreme Court majority has specifically rejected this argument with respect to Bellevue's fourfoot setback for erotic dance: "[A]rt. I, sec. 5 mentions only the right to speak, write and publish. In the absence of language relating to expressive conduct, we do not find that the text of art. I, sec. 5 justifies extending greater protection to the adult performances at issue here." *Ino Ino*, 132 Wash.2d at 117, 937 P.2d 154.

The Washington State Supreme Court has held that Bellevue's requirement, that individual table dancers perform at least four-feet from customers, does not rise to

the level of a prior restraint. *Ino Ino*, 132 Wash.2d at 127, 937 P.2d 154. Because we have held that proximity of a dance is not protected expression, the County's 10-foot regulation similarly does not constitute a prior restraint.

3. Time, Place, and Manner Restriction

The United States Supreme Court has noted that the O'Brien[11] test for regulation of expressive conduct " 'in the last analysis is little, if any, different from the standard applied to time, place, and manner restrictions.' " *Ward v. Rock Against Racism*, 491 U.S. 781, 798, 109 S.Ct. 2746, 2757, 105 L.Ed.2d 661 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298, 104 S.Ct. 3065, 3071, 82 L.Ed.2d 221 (1984)). *See also Barnes*, 501 U.S. at 566, 111 S.Ct. 2456. We examine the regulation here at issue under the time, place, and manner test enunciated in *Ward*, 491 U.S. at 791, 109 S.Ct. 2746.[12]

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[11] *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

[12] Both parties here assert that the 10-foot rule should be analyzed as a time, place, and manner restriction. We agree, though we note that we would reach the same result under the *O'Brien* test used by the majority in *Ino Ino*. Both tests require a content-neutral regulation (prong 1 of the *Ward* test, prong 3 of the *O'Brien* test), which is supported by a significant government interest (prong 2 of the *Ward* test, prong 2 of the *O'Brien* test), and which is narrowly tailored to further that interest (prong 2 of the *Ward* test, prong 4 of the *O'Brien* test). In addition, the *Ward* test requires that regulations leave open ample alternative channels for communication of the expression.

Commentators and courts have noted that, in establishing the *O'Brien* test, the United States Supreme Court specifically

Government may impose reasonable time, place, and manner restrictions on speech that are (1) content neutral, (2) narrowly tailored to serve a substantial governmental interest, and (3) leave open alternative channels for communication. *Ward*, 491 U.S. at 791, 109 S.Ct. 2746 (citing *Clark*, 468 U.S. at 293, 104 S.Ct. 3065). As explained above, in electing to apply federal constitutional law, the Washington Supreme Court has ruled that "sexually explicit dance" does not warrant "application of the more protective time, place, and manner analysis developed under art. I, sec. 5 of the state constitution." *Ino Ino*, 132 Wash.2d at 122, 937 P.2d 154.

a. Content Neutral

An ordinance is content-neutral if its predominant purpose is the amelioration of deleterious secondary effects of sexually explicit businesses. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49, 106 S.Ct. 925, 929-30, 89 L.Ed.2d 29 (1986). Expressive conduct, such as

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addressed the test to general regulations on conduct that have the incidental effect of restricting expression. SMOLLA, *supra* sec. 9:13 at 9-14; sec. 11:7 at 11-16. *See also Collin v. Smith*, 578 F.2d 1197, 1209 (7th Cir. 1978). *See, e.g., O'Brien*, 391 U.S. at 377, 88 S.Ct. 1673 (general ban on mutilation/destruction of draft cards applied to expressive burning of draft card); *Barnes*, 501 U.S. at 566, 111 S.Ct. 2456 (general ban on public nudity applied to expressive exotic dancing). The present case, however, does not involve a statute of general applicability that has an incidental effect on speech, but rather a statute that was specifically drafted to limit the place and manner of expressive conduct. As such, the *Ward* test is best suited to our analysis. But *see DFW Vending*, 991 F.Supp. at 593 n. 14.

dance, is more likely than "pure" speech to "become ensnared by contentneutral regulations passed for reasons unrelated to the suppression of expression." Smolla, *supra* sec. 11:7 at 11-16. A court considers all objective indicators of statutory intent from the face of the statute, the effect of the statute, comparison to prior law, facts surrounding enactment of the statute, its stated purpose, and the record of hearings concerning its enactment. *City of Las Vegas v. Foley*, 747 F.2d 1294, 1297 (9th Cir. 1984).

Pierce County Ordinance No. 94-5 states that its purpose is to curb "significant criminal activity" that has "historically and regularly occurred in the adult entertainment industry." Thus, it shows a legitimate purpose on its face. The County conducted a public hearing, studied the secondary effects of table dancing, and relied on the results to formulate the 10-foot distance requirement. The County concluded that regulation of the distance between dancer and patron was necessary to prevent significant criminal activity that has historically and regularly occurred in adult entertainment establishments, including prostitution, narcotics transactions, breaches of the peace, and organized crime.

The County produced ample evidence that its predominant purpose in enacting the Ordinance was the amelioration of deleterious secondary effects of erotic dancing.[13] The Ordinance neither prohibits nor circumscribes the content of erotic dancing. It merely regulates

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[13] *See Bolser v. Washington State Liquor Control Bd.*, 90 Wash.2d 223, 228, 580 P.2d 629 (1978) (upholding confinement of topless dancing to elevated platform six feet from customers in order to prevent secondary effects, similar to those involved here: "The goal of the regulation is not censorship of expression,

distance between dancer and patron. Moreover, the distance is not so great as to obscure the dance; on the contrary, audiences for many other dance performances are generally seated more than 10 feet back from a stage. *DFW Vending,* 991 F.Supp. at 594. Thus the Ordinance is content neutral.

b. Narrowly Tailored To Serve a Substantial Government Interest

i. Substantial Government Interest

The law is well settled that government has a substantial interest in eliminating deleterious secondary effects of nude dancing. The Supreme Court in *Ino Ino,* affirmed that "the governmental interest in preventing illegal contact is a rational basis for extending the minimum distance to eight feet," citing an experiment performed by the City of Bellevue that "a very tall customer could reach a nude stage dancer with only a separation of six feet." *Ino Ino,* 132 Wash.2d at 132-33, 937 P.2d 154. As in *Ino Ino,* the distance restriction here "facilitates the detection of public sexual contact and discourages contact from occurring in the first place." *Ino Ino,* 132 Wash.2d at 128, 937 P.2d 154. Thus the County has satisfied the substantial governmental interest requirement. *See also Barnes,* 501 U.S. 560 at 582, 111 S.Ct. 2456, 115 L.Ed.2d 504 (Souter, J., concurring).

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but the prevention of crime and disorderly conduct which is concomitant with the consumption of liquor in such situations.").

ii. Narrowly Tailored

The United States Supreme Court explained the meaning of "narrowly tailored" in *Ward*. An ordinance is narrowly tailored if it promotes a substantial government interest that would be achieved less effectively absent the ordinance. *Ward*, 491 U.S. at 799, 109 S.Ct. 2746 (citing *United States v. Albertini*, 472 U.S. 675, 105 S.Ct. 2897, 2906, 86 L.Ed.2d 536 (1985)). Ordinances are not invalid "simply because there is some imaginable alternative that might be less burdensome on speech." *Ward*, 491 U.S. at 797, 109 S.Ct. 2746 (citing *Albertini*, 472 U.S. at 675, 105 S.Ct. 2897).

The County has also satisfied the requirement that the Ordinance is narrowly tailored to promote a governmental interest: It produced a factual record of narcotics and prostitution transactions and other substantial evidence to support its conclusion that separation of more than an arm's length between dancer and customer is necessary to control these secondary effects. The County's previous, narrower attempt to curb secondary effects, with an ordinance declaring them illegal, proved ineffective.

Moreover, the law is clear that a regulation need not be the minimum restriction conceivable in order to meet the "narrowly tailored" prong. In *Ward*, the United States Supreme Court held that "a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate content-neutral interests but that it need not be the least restrictive or least intrusive means of so." *Ward*, 491 U.S. at 798, 109 S.Ct. 2746 (emphasis added). Here the County's 10-foot

rule is narrowly tailored because the prevention of illegal sexual conduct, prostitution, and narcotics transactions would be achieved less effectively absent this restriction.

c. Alternative Channels of Communications

Under the third pron [sic], the burden is on the government to show that the Ordinance leaves open practical and available alternative channels of communication. *Ward*, 491 U.S. at 791, 109 S.Ct. 2746. That dancing 10 feet away might not be as lucrative as dancing closer to patrons (a likely result of proximity's opportunity for illegal contact)[14] does not mean that an alternative locus for the protected expression of the dance is unavailable. To the contrary, alternatives for the protected expressive content of table dancing are available under the Ordinance: Dancers may perform the identical dance on a stage 10 feet away from the customers and 18 inches off the floor, closer to their audience than many other dancers engaged in artistic performances in theaters and concert halls. *DFW Vending*, 991 F.Supp. at 594. But alternatives for constitutionally unprotected components of table dancing, e.g., illegal sexual contact and narcotics transactions, are appropriately constrained by the Ordinance.

We have held that the proximity element of erotic dance does not constitute protected expression. Thus, the

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[14] In *Ino Ino*, the Supreme Court noted: "Decreased opportunity for illegal sexual contact could be one cause of customers' dissatisfaction," resulting in lower revenues for dancers. *Ino Ino*, 132 Wash.2d at 131, 937 P.2d 154.

focus for examining availability of alternative avenues of expression here is not close-by erotic dance confined to table tops, but rather erotic dance in general.

i. Ban on Table Dancing; Inevitable Destruction of Business

Supported by expert testimony, DCR claims that enforcement of the 10-foot rule will eliminate table dancing, which will render erotic dance clubs so unprofitable that all such businesses will inevitably fail. DCR thus argues that marketplace response to the 10-foot rule will eliminate all alternative avenues for the constitutionally protected expression that is erotic dance. Dicta in *Ino Ino* suggests that, under such circumstances, as *DCR* contends, "the distance requirement would be unconstitutional." *Ino Ino*, 132 Wash.2d at 130, 937 P.2d 154 (citing *Gomillion v. Lightfoot*, 364 U.S. 339, 340-41, 81 S.Ct. 125, 126-27, 5 L.Ed.2d 110 (1960)).

But *Gomillion* does not support this dicta. Rather *Gomillion* is a voting rights case involving redistricting, alleged to have the " 'inevitable effect' of depriving a racial group of their constitutional right to vote." *Ino Ino*, 132 Wash.2d at 130-31, 937 P.2d 154. Not all speech and conduct are constitutionally protected; rather there is a continuum of First Amendment protection, ranging from the most highly protected political speech and speech-like conduct (e.g. the flag-burning cases)[15] to the least

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[15] *United States v. Eichman*, 496 U.S. 310, 110 S.Ct. 2404, 110 L.Ed.2d 287 (1990); *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989).

protected expressive conduct of nude dancing, which " 'clings to the edge' " of constitutional protection. *Ino Ino*, 132 Wash.2d at 117, 937 P.2d 154 (quoting *JJR*, 126 Wash.2d at 9, 891 P.2d 720). *See also Barnes*, 501 U.S. at 566, 111 S.Ct. 2456; *DFW Vending*, 991 F.Supp. at 590.

Yet *Ino Ino* also acknowledges that federal court decisions, especially those of the United States Supreme Court, are controlling on the issue of constitutionally protected free speech and expressive conduct. But the federal courts have ruled contrary to *Ino Ino's* dicta when addressing economic impacts relative to nude or erotic dance and alternative venues.

ii. Diminished Commercial Viability Without Limiting Alternatives

Although raised in the context of a zoning case, the Supreme Court's analysis in *Playtime Theatres*, 475 U.S. at 54, 106 S.Ct. 925, is applicable here. Both *Playtime Theatres* and the instant case involve the issue of whether government regulations that diminish commercial viability of a business would thereby eliminate alternative avenues of protected communication. In *Playtime Theatres*, the United States Supreme Court held that the action of the market does not limit alternative avenues of communication; only government's prevention of entry into the market can be characterized as eliminating such alternatives. *See also DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 413 (6th Cir. 1997) ("if the ordinance were intended to destroy the market for adult cabarets, it might run afoul of the First Amendment") (emphasis added); *DFW Vending*, 991 F.Supp. at 595 (summarizing economic impact cases in the

context of the "narrow tailoring" element of the *O'Brien* test).

In *Playtime Theatres* the United States Supreme Court confronted zoning regulations that forced certain adult establishments to relocate. While there was a sufficient quantity of sites available to provide "alternative avenues of communication," the respondents argued that these sites did not provide real alternatives because the sites were not "commercially viable," because either the land was already owned and developed or the undeveloped land was not for sale. The argument, in essence, was that the prohibitive cost of relocating adult businesses effectively foreclosed all alternative avenues of communication.

The Supreme Court rejected this argument, stating,

> That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. And although we have cautioned against the enactment of zoning regulations that have "the effect of suppressing, or greatly restricting access to, lawful speech," we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices. ("The inquiry for First Amendment purposes is not concerned with economic impact.") In our view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city. . . .

Playtime Theatres, 475 U.S. at 54, 106 S.Ct. 925 (citations omitted).

Similarly, in the context of adult businesses, lower federal courts have consistently rejected financial feasibility as a consideration in determining whether alternative avenues of expression are available. *See, e.g., Spokane Arcade, Inc. v. City of Spokane*, 75 F.3d 663, 665-66 (9th Cir. 1996) (an ordinance requiring open booths for viewing sexually explicit material did not violate the First Amendment, even though it reduced profitability).

> Ultimately, all of plaintiff's arguments boil down to a complaint that the ordinance reduces their audience and adversely affects profits. To the extent they claim the ordinance denies them total access to their market, this contention is rejected. More likely, however, plaintiffs argue that the ordinance reduces their market from an economic perspective that it will no longer be profitable as before the ordinance. Whether or not this proves to be the case, it does not show lack of narrow tailoring.

DFW Vending, 991 F.Supp. at 595. The only relevant inquiry is whether the plaintiffs are politically free to engage in protected speech, not whether the regulation will cause a decrease in profits. *See also Mitchell v. Commission on Adult Entertainment Establishments*, 10 F.3d 123, 132 n. 10 (3d Cir. 1993) (finding that the First Amendment does not guarantee anyone a profit); *International Food & Beverage Sys. v. City of Fort Lauderdale*, 794 F.2d 1520, 1526 (11th Cir. 1986), *aff'd*, 838 F.2d 1220 (11th Cir. 1988); *Movie & Video World, Inc. v. Board of County Comm'rs*, 723 F.Supp. 695, 700 (S.D.Fla.1989).

iii. Controlling Precedent

Paramount to the dicta in Ino Ino,[16] we must apply the economic effects analysis of the United States Supreme Court in the *Playtime Theatres*, as followed by the Ninth Circuit in *Spokane Arcade*. DCR argues that the 10-foot rule will render unprofitable, and thereby force closure of, all Pierce County adult dancing establishments, thus effectively eliminating all avenues of communication for constitutionally protected erotic dancing. But only a denial of access to the market constitutes an unconstitutional elimination of alternative channels.[17] Where government actions have not overtly denied adult businesses the ability to open and to operate, but have merely made it more difficult to earn a profit, there has been no governmental elimination of alternative channels, and consequently, no denial of the First Amendment right of free speech or expression. *See Spokane Arcade*, 75 F.3d at 664-65; *Mitchell*, 10 F.3d at 132; *International Food & Beverage Sys.*, 794 F.2d at 1526; *Movie & Video World*, 723 F.Supp. at 700.

Here, the Ordinance restricts only the place and manner of the dance, but not its content. Rather, it restricts the opportunity for illegal activity that proximity

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[16] "Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed." *State v. Potter*, 68 Wash.App. 134, 150, 842 P.2d 481 (1992) (citation omitted). Dicta is not controlling precedent. *Noble Manor v. Pierce County*, 133 Wash.2d 269, 289, 943 P.2d 1378 (1997) (concurring opinion).

[17] Denial of access to the market would also most likely be viewed as a prior restraint.

enhances; such illegal activity is not sheltered by the First Amendment simply because it is incorporated into a dance that is otherwise entitled to such protection.[18] Accordingly, in restricting the location of erotic dance performance, the County's 10-foot rule meets the *Ward* time, place, and manner test.

C. Due Process; Overbreadth

DCR's additional due process and overbreadth challenges to the Ordinance's constitutionality are essentially duplicative of their other arguments and fail for similar reasons. As already explained, the distance regulation is aimed at achieving a legitimate public purpose; it uses means that are reasonably related to achieve that purpose; and it is not unreasonably oppressive to DCR. *Sintra, Inc. v. City of Seattle,* 119 Wash.2d 1, 829 P.2d 765 (1992) (due process). The fact that less burdensome measures, such as higher fines, might be theoretically available to control the deleterious secondary effects of erotic dancing, does not render the Ordinance violative of due process. *Ward,* 491 U.S. at 800, 109 S.Ct. 2746.

"Application of the overbreadth doctrine is strong medicine . . . and should be employed by a court sparingly and only as a last resort." *State v. Halstien,* 122 Wash.2d 109, 122, 857 P.2d 270 (1993) (citations omitted). We do not find convincing DCR's argument that the Ordinance is overbroad, especially in light of *Ino Ino's* (1)

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[18] *See Hang On,* 65 F.3d at 1253 ("That the physical conduct occurs while in the course of protected activity does not bring it within the scope of the First Amendment.").

refusal to extend to sexually explicit dancing the Washington Constitution's generally lower tolerance for overly broad restrictions on speech, and (2) rejection of an analogous overbreadth claim as applied to Bellevue's similar four-foot rule. *Ino Ino*, 132 Wash.2d at 117-20, 937 P.2d 154.

DCR argues that the Ordinance sweeps too broadly and could encompass other types of dance not shown to be accompanied by deleterious secondary effects. We faced and rejected an analogous argument in *State v. Stephenson*, 89 Wash.App. 794, 800, 950 P.2d 38 (1998),

> Although it is possible to conceive of circumstances in which application of the statute would be unreasonable, that alone will not render it unconstitutional. Members of *City Council v. Taxpayers [for Vincent]*, 466 U.S. 789, 800, 104 S.Ct. 2118, 2126, 80 L.Ed.2d 772 (1984). Unless there is a realistic danger that the statute will significantly compromise recognized First Amendment protections of parties not before the court, we will not declare it facially invalid on overbreadth grounds. *Taxpayers*, [466 U.S. at 801, 104 S.Ct. 2118]. We do not see that danger here.

Stephenson, 89 Wash.App. at 804, 950 P.2d 38 (emphasis added). Similarly, we see no danger here that the Ordinance will be used to criminalize innocent dance of the type DCR hypothesizes. Although PCC 5.14.190 subsection H uses the term "all dancing," the surrounding subsections, as well as Pierce County's Adult Entertainment Ordinance read as a whole, PCC chapter 5.14, clearly apply only to "erotic dance" that "seeks to arouse

or excite the patrons' sexual desires." PCC 5.14.010(B), (D); 5.14.020.

D. Tipping Restrictions

DCR next challenges the constitutionality of the Ordinance's restrictions on tipping. Section (K) of PCC sec. 5.14.190 prevents patrons from giving direct tips to dancers. Section (L) prevents dancers from soliciting tips directly from patrons. DCR contends the tipping rules are prior restraints because (1) they prevent dancers from earning compensation, and (2) they give County officials unbridled discretion to decide what constitutes a direct tip.[19]

DCR produced evidence that the industry practice is for dancers to pay the studio for the opportunity to dance; the dancer's sole compensation is direct tips. The tipping restriction does not prohibit erotic dancers from working, from receiving tips indirectly, or from being compensated by customers or dance studio operators for

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[19] DCR analogizes the instant case to *United States v. National Treasury Employees Union*, 513 U.S. 454, 115 S.Ct. 1003, 1014, 130 L.Ed.2d 964 (1995), in which the Court held that Congress had enacted an unconstitutional prior restraint when it precluded federal employees from accepting honoraria for their speeches. The Supreme Court distinguished *National Treasury* by noting that distance regulations do not place "restrictions on the amount of payment dancers may receive and thus, does not effectively foreclose a reasonable means of earning a living." *Ino Ino*, 132 Wash.2d at 131, 937 P.2d 154.

their work. Rather, the Ordinance merely halts the current practice of customers paying dancers directly,[20] resulting in lessened opportunity for prostitution and other illegal activity that has contributed to the profitability of table dancing.

DCR also argues that the tipping restriction is a prior restraint because it vests the County with unfettered discretion to decide what constitutes a "direct" tip.[21] We have a duty, if possible, to construe an ordinance so as to uphold its constitutionality. *State ex rel. Herron v. Browet, Inc.*, 103 Wash.2d 215, 219, 691 P.2d 571 (1984). Here it is possible to construe the tipping portion of the Ordinance to uphold its constitutionality.

The Ordinance does not give County officials unfettered discretion to decide what constitutes a direct tip. "Direct" is defined as "proceeding from one point to another in time or space without deviation or interruption." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 640 (1969). This construction satisfies DCR's vagueness concerns by eliminating any inappropriate discretion that might have been vested in the County official. As so construed, the Ordinance rovides [sic] narrow,

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[20] The record reflects many abuses of direct tipping in erotic dance studios.

[21] A licensing scheme containing vague terms gives the government unfettered discretion to issue or to deny a license and thus presents a danger that the decision maker may exercise its judgment to suppress speech based on content. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-26, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990).

objective, and definite standards for application and thus, passes constitutional muster.

E. Licensing Scheme

DCR contends that the licensing scheme constitutes an unconstitutional prior restraint on its freedom of expression because: (1) it gives the auditor unlimited time in which to issue a licensing decision; (2) it gives the hearing examiner unlimited time to decide an appeal of an adverse auditor's decision; and (3) it does not provide for a stay of an adverse auditor's decision pending judicial review. We analyze each contention in turn.

1. Time Limit on Licensing Decision

DCR contends PCC sec. 5.14.070 is unconstitutional. It reads as follows: "The Auditor shall issue an erotic dance studio license within thirty days of receipt of both a properly-completed application and application fee, and upon finding that the business complies with all applicable fire, building, and zoning codes." DCR argues that the Ordinance infringes on its free speech rights because it allows the auditor to delay indefinitely a licensing decision as follows: Even though the Ordinance requires the auditor to issue a license within 30 days of finding that the applicant complies with health, fire, and building codes, the auditor has unlimited time in which to make such a finding.

A license must be issued within a reasonable period of time, because undue delay results in the suppression of protected speech. *FW/PBS, Inc. v. City of Dallas,* 493 U.S.

215, 227, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990). A licensing scheme that fails to provide definite time limitations for a decision is constitutionally infirm because the delay compels the speaker's silence. *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 802, 108 S.Ct. 2667, 2680, 101 L.Ed.2d 669 (1988).

Again, we must construe an ordinance to uphold its constitutionality, if possible. *Browet*, 103 Wash.2d at 219, 691 P.2d 71. Although the above language is not a model of clarity, the only logical construction is that the Ordinance requires the auditor to make a licensing decision within 30 days of receipt of a complete application and fee, where it is readily ascertainable that the business complies with safety codes and zoning restrictions. But where, for example, the building or proposed seating arrangements violate the fire code, then the license would issue within 30 days after such violations were shown to have been corrected. Similarly, if the complete application proposed an erotic dance studio in a zone in which such business was prohibited or restricted, the auditor would issue a license within 30 days after either removal of the zoning restriction or a change in location to a zone in which this type of business is a permitted use. Such construction renders the Ordinance constitutional.

Accordingly, we hold that the Ordinance's licensing scheme is constitutional because it provides a reasonable and definite time limit on the County's discretion to issue a license to an erotic dance studio.

2. Stay Pending Judicial Review

DCR next argues that Section 5.14.240 does not provide for a stay of an adverse hearing examiner's decision pending judicial review, as required by *JJR*, 126 Wash.2d at 10, 891 P.2d 720. We disagree.

The pertinent section of the Ordinance is set forth below:

> [PCC Section] 5.14.240. Appeal and Hearing.
>
> A. Any applicant/licensee that has had a license denied, revoked or suspended by the Auditor shall have the right to appeal such action to the Pierce County Hearing Examiner, by filing a notice of appeal with the Auditor within ten working days after receiving notice of the action. The matter shall be heard within ninety days by the Hearing Examiner, unless the parties agree otherwise.
>
> B. The filing of an appeal by an applicant/licensee shall stay the action of the Auditor, pending a resolution of the matter.
>
> C. The decision of the Hearing Examiner shall be based upon a preponderance of the evidence.
>
> D. The burden of proof shall be on the Auditor.
>
> E. The decision of the Hearing Examiner shall be final unless appealed to Superior Court within ten working days from the date the decision is entered by filing an appropriate action and serving all necessary parties.

Section B provides that an appeal stays an auditor's action "pending resolution of the matter." Since a matter

is not resolved until the appeal process is completed, it follows that an appeal from a hearing examiner's decision stays an appealed hearing examiner's decision, as well as the auditor's action that is the subject of both hearing examiner and judicial review. In light of our duty to construe the Ordinance to uphold its constitutionality, we interpret the Ordinance as providing for a stay during the appeal of a hearing examiner's decision.

3. Time Limit on Appeal

DCR next objects that the Ordinance gives the hearing examiner unlimited time in which to issue a decision. Because the Ordinance provides for a stay of an adverse administrative decision, it assures that an applicant's ability to exercise constitutionally protected rights of expression are not unreasonably restrained. By thus preserving the status quo, DCR is not harmed by an adverse decision. *See FW/PBS*, 493 U.S. at 228, 110 S.Ct. 596. *See also National Socialist Party of America v. Village of Skokie*, 432 U.S. 43, 44, 97 S.Ct. 2205, 2206, 53 L.Ed.2d 96 (1977). It is therefore irrelevant that the Ordinance does not place a time limit on the hearing examiner's decision.

F. Attorney Fees

We deny DCR's request for attorney fees.

CONCLUSION

We hold the Ordinance constitutional and affirm the trial court.

HOUGHTON, C.J., concurs.

ARMSTRONG, Judge (dissenting).

I respectfully dissent. DCR presented the trial court with the declarations of two experts. One testified that: "It is my professional opinion that requiring dancers to maintain such distance [10 feet] directly and unmistakably effects (sic) the content of the erotic message sought to be conveyed by the performer."[22] The other expert concluded that distance is an expressive component of the dance, and that requiring a 10-foot separation between a dancer and a patron regulates the content of the dance.[23]

In the face of this, the majority holds as a matter of law that the "proximity" of the dance is not an element of the "content" of the dance. This is not only contrary to the rules of summary judgment, but inconsistent with *Ino Ino, Inc. v. City of Bellevue*, 132 Wash.2d 103, 937 P.2d 154 (1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 856, 139 L.Ed.2d 755 (1998), which treated the issue as one of fact.[24]

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[22] Clerk's Papers, at 383 (Declaration of Dr. Judith Hanna).

[23] Clerk's Papers, at 320-21 (Declaration of Edward Donnerstein).

[24] *Ino Ino* stood in a different procedural posture than the present case. *Ino Ino* came before the Washington Supreme Court after a trial on the merits, which was tried in the King County Superior Court. The trial court found that "distance restrictions did not prevent patrons from perceiving the eroticism of the dancers' performance" and "that a dancer can convey eroticism from a distance of four feet from the patron's torso." *Ino Ino*, 132 Wash.2d at 113-14, 937 P.2d 154. These findings of fact were upheld by the Supreme Court as supported

DCR also presented the trial court with the declaration of Richard L. Wilson, an attorney and business consultant for adult entertainment establishments in several states.[25] Wilson testified that: "Without table dances, entertainers would not be able to earn a living, and adult nightclubs would suffer severe financial losses and be forced to close, thus terminating their presentation of entertainment which is protected by the First Amendment."[26]

DCR thus presents us with the proposition, which we must accept on summary judgment, that enforcement of the 10-foot rule will inevitably close the businesses and stop the dancing. In *Ino Ino*, the Washington Supreme Court said, "[i]f such a failure [of the adult cabarets] was inevitable, then the distance requirement would be unconstitutional." *Ino Ino*, 132 Wash.2d at 130, 937 P.2d 154. *Ino Ino* cited *Gomillion v. Lightfoot*, 364 U.S. 339, 340-41, 81 S.Ct. 125, 126-27, 5 L.Ed.2d 110 (1960), for the proposition. But the majority believes it is not bound by

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by substantial evidence. *Ino Ino*, 132 Wash.2d at 114, 937 P.2d 154.

[25] DCR also presented the declarations of Steve Fueston, a general partner in the corporation which ran the Papagayos adult club in Bellevue which was the subject of the *Ino Ino* case, and the declaration of Paul E. Bern, the Director of Operations for the management company of the Deja-Vu adult nightclub located in Federal Way. The principal thrust of both declarations was that regulation of the distance between the dancers and the patrons caused the establishments to operate at a loss, caused dancers to cease their dancing at establishments covered by distance regulations, and caused these clubs to sustain economic losses which had, or would, result in their closure.

[26] Clerk's Papers, at 413 (Declaration of Richard L. Wilson).

this because the statement is "dicta,"[27] and because *Gomillion* does not support the statement. I disagree. Although *Gomillion* was a voting rights case, not a nude dancing case, the Supreme Court cited it for the proposition that any ordinance that totally deprives one of a constitutionally guaranteed right must fail. I agree. It is not an answer to attempt to distinguish nude dancing from voting rights because nude dancing is "the least protected expressive conduct" as the majority does.[28] If nude dancing is entitled to some First Amendment protection, then any ordinance that totally eliminates the dancing is unconstitutional. *Ino Ino*, 132 Wash.2d at 130, 937 P.2d 154. DCR is entitled to a hearing on whether enforcement of the 10-foot rule will inevitably close the business and thus prevent any dancing. If the trial court finds such failure inevitable, then the Ordinance is unconstitutional.

I also question the majority's conclusion, under its time, place, and manner analysis that ample alternative avenues of communication remain. If the dancers are correct that the Ordinance will stop them from dancing, clearly no alternative channels of communication will be open.

I further disagree with the majority's discussion of the economic impact of the ordinance. The majority relies primarily upon *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), and *Spokane Arcade, Inc. v. City of Spokane*, 75 F.3d 663 (9th Cir. 1996).

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[27] Majority Opinion at 393.

[28] Majority Opinion at 392.

Neither case faced the issue we have here: The validity of an ordinance that will totally stop the dancing. *Playtime Theatres* dealt with a zoning ordinance and the trial court found that under the challenged ordinance, the adult theaters had "ample, accessible real estate," on which to put their theaters. *Playtime Theatres*, 475 U.S. at 53, 106 S.Ct. 925. The Supreme Court concluded that the city had not effectively denied "respondents a reasonable opportunity to open and operate an adult theater within the city. . . . " *Playtime Theatres*, 475 U.S. at 54, 106 S.Ct. 925. But the court reiterated its concern about any zoning regulation that had "the effect of suppressing, or greatly restricting access to, lawful speech. . . . " *Playtime Theatres*, 475 U.S. at 54, 106 S.Ct. 925. Here, if the dancers are correct, the Ordinance will totally suppress their protected expression.

In *Spokane Arcade*, the court discussed the appropriate consideration to be given to the economic impact of a regulation. The court distinguished between an impact that prevents entry into the market place and one that only makes success in the market more difficult. *Spokane Arcade*, 75 F.3d at 666. Only the former, according to *Spokane Arcade* is an appropriate consideration in a First Amendment challenge. The court upheld the ordinances in question because they "do not deny World Video the opportunity to operate its establishments, but merely (or rather, allegedly) increase the costs of its doing so." *Spokane Arcade*, 75 F.3d at 667. I find no meaningful distinction between an ordinance that prohibits entry to the market and one that allows entry, but dooms the business to inevitable failure. But assuming such a distinction to exist, here, if the dancers are correct, the ordinance will

close the present dance clubs and prevent the opening of new clubs, thus denying the dancers access to the market.

In short, DCR and the dancers have raised issues of material fact as to whether proximity is part of the content of their dance and whether the ordinance will inevitably cause economic failure and, thus, closing of the clubs. They are entitled to a hearing on these issues.

THE SUPREME COURT OF WASHINGTON

DCR, INC., a Washington corporation; and KATHY T. JOHNSON, Petitioners, v. PIERCE COUNTY, Respondent.	NO. 67530-9 **ORDER** C/A NO. 21416-4-II

Department II of the Court considered this matter at its May 5, 1999, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 5th day of May, 1999.

/s/ Richard P. Guy
CHIEF JUSTICE

EXHIBIT "A" TO ORDINANCE NO. 94-5

"NEW CHAPTER"

Chapter 5.14
ADULT ENTERTAINMENT INDUSTRY LICENSING AND REGULATION

Sections:

5.14.010 Definitions.
5.14.020 Prima Facie Evidence of Erotic Dance Studio.
5.14.030 Studio License – Application to Auditor.
5.14.040 Studio License – Information Required.
5.14.050 Studio License – Fee.
5.14.060 Studio License – Transmittal of Application.
5.14.070 Studio License – Issuance.
5.14.080 Studio License – Expiration.
5.14.090 Studio License – Renewal.
5.14.100 Dancer's License – Required.
5.14.110 Manager's License – Required.
5.14.120 Dancer's/Manager's License – Application to Auditor.
5.14.130 Dancer's/Manager's License – Information Required.
5.14.140 Dancer's/Manager's License – Fee.
5.14.150 Dancer's/Manager's License – Issuance.
5.14.160 Dancer's/Manager's License – Expiration.
5.14.170 Dancer's/Manager's License – Renewal.
5.14.180 Manager on Premises.
5.14.190 Operation Restrictions – Unlawful Acts Designated.
5.14.200 Public Display Prohibited.
5.14.210 Inspection of Records and Premises Authorized.
5.14.220 Standards for Denial of License.
5.14.230 Standards for Revocation – Suspension of License.

5.14.240 Appeal and Hearing.
5.14.250 Violation – Penalty.
5.14.260 Severability.

5.14.010 Definitions.

In this Chapter, the following definitions shall apply unless the context clearly requires otherwise:

A. "Auditor" means the Pierce County Auditor and/or his/her employee or agent.

B. "Dancer" means a person who dances or otherwise performs for or at an erotic dance studio and seeks to arouse or excite the patrons' sexual desires.

C. "Employee" means any and all persons, including dancers, lessees and independent contractors, who work in or at or render any services to the operation of an erotic dance studio.

D. "Erotic dance studio" means a fixed place of business which emphasizes and seeks, through one or more dancers, to arouse or excite the patrons' sexual desires.

E. "Manager" means any person who manages, directs, administers, or is in charge of the affairs and/or conduct of any portion of any activity at an erotic dance studio.

F. "Sheriff" means the Pierce County Sheriff and his/her agents.

G. "Verified" means

1. Attested to by the applicant or licensee in writing, and

2. Notarized.

5.14.020 Prima Facie Evidence of Erotic Dance Studio.

It shall be prima facie evidence that a business is an erotic dance studio when one or more dancers display or expose, with less than a full opaque covering, that portion of the female breast lower than the upper edge of the areola and/or any portion of the human genitals.

5.14.030 Studio License – Application to Auditor.

Application for erotic dance studio license shall be made to the Auditor.

5.14.040 Studio license – Information Required.

An application for erotic dance studio license shall be verified and shall contain or set forth the following information:

A. The name, address, telephone number, principal occupation, and age of the applicant;

B. The name, address, and principal occupation of the managing agent or agents of the business;

C. The business name, business address, and business telephone number of the establishment or proposed establishment together with a description of the nature of the business and magnitude thereof;

D. Whether the business or proposed business is the undertaking of a sole proprietorship, partnership, or corporation:

1. If a sole proprietorship, the application shall set forth the name, address, telephone number, and principal occupation of the sole proprietor.

2. If a partnership, the application shall set forth the names, addresses, telephone numbers, principal occupations, and respective ownership shares of each partner, whether general, limited, or silent.

3. If a corporation, the application shall set forth the corporate name, a copy of the articles of incorporation, and the names, addresses, telephone numbers, and principal occupations of every officer, director, and shareholder (having more than five percent of the outstanding shares) and the number of shares held by each;

E. The names, addresses, telephone numbers, and principal occupations of every person, partnership, or corporation having any interest in the real or personal property utilized or to be utilized by the business or proposed business.

5.14.050 Studio License – Fee.

Applications shall be accompanied by a non-refundable fee of $500.00.

5.14.060 Studio License – Transmittal of Application.

Within seven days of receipt of an application for an erotic dance studio license, the Auditor shall transmit copies of such application to the Sheriff for review and recommendation, and to the Fire Prevention Bureau and the Planning and Land Services Department for review and report as to the Applicant's compliance with all

applicable fire, building, and zoning requirements of Pierce County.

5.14.070 Studio License – Issuance.

The Auditor shall issue an erotic dance studio license within thirty days of receipt of both a properly-completed application and application fee, and upon finding that the business complies with all applicable fire, building, and zoning codes.

5.14.080 Studio License – Expiration.

An erotic dance studio license shall expire on December 31st of the year in which it is issued.

5.14.090 Studio License – Renewal.

An erotic dance studio license may be renewed or reinstated after a period of revocation by following the application procedures set forth in Sections 5.14.030 through 5.14.080.

5.14.100 Dancer's License – Required.

No person, whether employee or non-employee, shall dance at an erotic dance studio without a valid dancer's license issued by the Auditor.

5.14.110 Manager's License Required.

No person shall work as a manager at an erotic dance studio without having first obtained a manager's license from the Auditor.

5.14.120 Dancer's/Manager's License – Application to Auditor.

Application for dancer's/manager's licenses shall be made to the Auditor.

5.14.130 Dancer's/Manager's License – Information Required.

An application for dancer's/manager's license shall contain or set forth the following information:

A. The applicant's signature notarized or certified to be true under penalty or perjury.

B. The applicant's name, home addresses (current and former), home telephone number, date of birth, and aliases (past or present), photograph, fingerprints, and social security number.

C. Documentation that the applicant has attained the age of eighteen years. Any two of the following shall be accepted as documentation of age:

1. A valid motor vehicle operator's license issued by any state bearing the applicant's photograph and date of birth;

2. An identification card bearing the applicant's photograph and date of birth issued by a federal or state government agency;

3. An official passport issued by the United States of America.

4. A certificate of birth.

D. The business name and address where the applicant intends to dance/work.

5.14.140 Dancer's/Manager's License – Fee.

Applications shall be accompanied by a non-refundable fee of $50.00. If a license is lost, one duplicate license may be issued by the Auditor for a fee of $25.00.

5.14.150 Dancer's/Manager's License – Issuance.

The Auditor shall issue the license promptly upon receipt of both a properly-completed application form and the license fee.

5.14.160 Dancer's/Manager's License – Expiration.

A dancer's/manager's license shall expire one year after the date of issuance.

5.14.170 Dancer's/Manager's License – Renewal.

A dancer's/manager's license may be renewed or reinstated after a period of revocation by following the application procedures set forth in Sections 5.14.120 through 5.14.150.

5.14.180. Manager on Premises.

A. A licensed manager shall present be [sic] on the premises of an erotic dance studio at all times when open for business.

B. It shall be the responsibility of the manager to verify that any dancer within the premises possesses a current and valid dancer's license.

C. The manager shall, upon request by any law enforcement officer or business license inspector, make available for inspection the dancers' licenses required to be on the premises as described herein.

5.14.190 Operation Restrictions – Unlawful Acts Designated.

Violation of any subsection (A-T) shall be a separate and distinct offense.

A. No person, firm, partnership, corporation, or other entity shall advertise, or cause to be advertised, an erotic dance studio without a valid erotic dance studio license issued pursuant to this Chapter.

B. No later than March 1 of each year, an erotic dance studio licensee shall file a verified report with the Auditor showing the licensee's gross receipts and amounts paid to dancers for the preceding calendar year.

C. An erotic dance studio licensee shall maintain and retain for a period of two years the names, addresses, and ages of all persons employed as dancers by the licensee.

D. No erotic dance studio licensee shall employ as a dancer a person under the age of eighteen years of age or a person not licensed pursuant to this Chapter.

E. No person under the age of eighteen years shall be admitted into an erotic dance studio.

F. No erotic dance studio licensee shall serve, sell, distribute, consume, or possess any intoxicating liquor or controlled substance upon the premises of the licensee.

G. An erotic dance studio licensee shall conspicuously display the studio licenses required by this Chapter.

H. All dancing shall occur on a platform intended for that purpose which is raised at least eighteen inches from the level of the floor and no closer than ten feet to any patron.

I. No dancer or employee shall fondle, caress, or touch any patron in a manner which seeks to arouse or excite the patrons' sexual desires.

J. No patron shall fondle, caress, or touch any dancer or employee in a manner which seeks to arouse or excite the patrons' sexual desires.

K. No patron shall pay or give any gratuity directly to any dancer.

L. No dancer shall solicit any pay or gratuity directly from any patron.

M. No dancer or employee shall expose their breasts below the top of the areola or expose any portion of the pubic hair, vulva or genitals, anus and/or buttocks,

except upon a stage at least eighteen inches above the immediate floor level and removed at least ten feet from the nearest patron.

N. The stage or the entire interior portion of cubicles, rooms, or stalls wherein adult entertainment is provided must be visible from the common areas of the premises. Visibility shall not be blocked or obscured by doors, curtains, drapes, or any other obstruction whatsoever.

O. No activity or dancing occurring on the premises shall be visible at any time from any public place.

P. No dancer shall be visible from any public place during the hours of their employment, or apparent hours of their employment on the premises.

Q. A 36" x 24" sign shall be conspicuously displayed in the common area of the premises, and shall read as follows:

THIS EROTIC DANCE STUDIO IS REGULATED BY PIERCE COUNTY.

1. ALL DANCING MUST OCCUR ON STAGE AND NO CLOSER THAN TEN FEET TO ANY PATRON.

2. DANCERS AND EMPLOYEES ARE NOT PERMITTED TO TOUCH, CARESS OR FONDLE ANY PATRON IN A MANNER WHICH SEEKS TO AROUSE OR EXCITE THE PATRONS' SEXUAL DESIRES.

3. PATRONS ARE NOT PERMITTED TO TOUCH, CARESS OR FONDLE ANY DANCER OR EMPLOYEE IN A MANNER WHICH SEEKS

TO AROUSE OR EXCITE THE PATRONS' SEXUAL DESIRES.

4. NO MONEY OR GRATUITY MAY BE ACCEPTED OR SOLICITED BY ANY DANCER FROM A PATRON.

R. Dances/performances/exhibits that are obscene are not permitted. Obscene is defined as:

1. Whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; and

2. Whether applying those same contemporary community standards, the average person would find that the work depicts or describes in a patently offensive way, the following sexual conduct:

a. ultimate sexual acts, normal or perverted, actual or simulated; or

b. masturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibitions of the genitals or genital area; or

c. violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape, or torture; and

3. Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

S. This Chapter shall not be construed to prohibit:

1. Plays, operas, musicals, or other dramatic works which are not obscene;

2. Classes, seminars, and lectures held for serious scientific or educational purposes; or

3. Exhibitions or dances which are not obscene.

5.14.200 Public Display Prohibited.

No person, firm, partnership, corporation or other entity shall publicly display or expose or cause public display or exposure, with less than a full opaque covering of any portion of a person's genitals, pubic area, or buttocks in an obscene fashion.

5.14.210 Inspection of Records and Premises Authorized.

All books and records required to be kept pursuant to this Chapter shall be open to inspection by the Auditor, Sheriff, Prosecuting Attorney, or agents thereof, during the hours when the erotic dance studio is open for business. The purpose of such inspection shall be to determine if the books and records meet the requirements of this Chapter.

5.14.220 Standards for Denial of License.

The Auditor shall deny any erotic dance studio/dancer/manager license applied for under provisions of this Chapter if he/she determines that the applicant has:

A. Made a materially false statement in the application for a license which the applicant knows to be false. "Materially false statement" means any false statement, oral or written, regardless of its admissibility under the

rules of evidence, which could have affected the course or outcome of the license application;

B. Proposed a place of business or establishment to be licensed which does not comply with all applicable requirements of the fire, building, and zoning codes of Pierce County.

5.14.230 Standards for Revocation and Suspension of License.

A. The Auditor shall revoke or suspend, for a specified period of not more than one year, any erotic dance studio license if he/she determines that the licensee or applicant has: made a materially false statement in the application for a license which the applicant knows to be false; or violated or permitted violation of any provisions of this Chapter.

B. The Auditor shall revoke or suspend, for a specified period of not more than one year, any dancer/manager license if he/she determines that the licensee or applicant has: made a materially false statement in the application for a license which the applicant knows to be false; or violated or permitted violation of any provisions of this Chapter.

5.14.240 Appeal and Hearing.

A. Any applicant/licensee that has had a license denied, revoked or suspended by the Auditor shall have the right to appeal such action to the Pierce County Hearing Examiner, by filing a notice of appeal with the Auditor within ten working days after receiving notice of

the action. The matter shall be heard within ninety days by the Hearing Examiner, unless the parties agree otherwise.

B. The filing of an appeal by an applicant/licensee shall stay the action of the Auditor, pending a resolution of the matter.

C. The decision of the Hearing Examiner shall be based upon a preponderance of the evidence.

D. The burden of proof shall be on the Auditor.

E. The decision of the Hearing Examiner shall be final unless appealed to Superior Court within ten working days from the date the decision is entered by filing an appropriate action and serving all necessary parties.

5.14.250 Violation – Penalty.

In addition to or as an alternative to any other penalty provided herein or by law, any person, firm, or corporation violating any provision of this Chapter shall be guilty of a misdemeanor, and each such person, firm, or corporation shall be deemed guilty of a separate offense for each and every day during which any violation is committed, continued, or permitted, and upon conviction of any such violation such person, firm, or corporation shall be punished by a fine of not more than $1,000.00, or by imprisonment for not more than ninety days, or by both such fine and imprisonment; provided, no person shall be deemed guilty of any violation of this Chapter if acting in an investigative capacity pursuant to the request or order of the Sheriff or Prosecuting Attorney or duly appointed agent thereof.

5.14.260 Severability.

If any Section, sentence, clause, or phrase of this Chapter shall be held invalid or unconstitutional, the validity or constitutionality thereof shall not affect the validity or constitutionality of any other section, sentence, clause, or phrase of this Chapter.

WASHINGTON REVISED CODE

CERTIORARI

7.16.030. Certiorari defined

The writ of certiorari may be denominated the writ of review. Enacted by Laws 1895, ch. 65, § 3.

7.16.040. Grounds for granting writ

A writ of review shall be granted by any court, except a municipal or district court, when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law.

Enacted by Laws 1895, ch. 65, § 4. Amended by Laws 1987, ch. 202, § 130.

7.16.050. Application for writ – Notice

The application must be made on affidavit by the party beneficially interested, and the court may require a notice of the application to be given to the adverse party,

or may grant an order to show cause why it should not be allowed, or may grant the writ without notice.

Enacted by Laws 1895, ch. 65, § 5.

7.16.060. Writ, to whom directed

The writ may be directed to the inferior tribunal, board or officer, or to any other person having the custody of the record or proceedings to be certified. When directed to a tribunal the clerk, if there be one, must return the writ with the transcript required.

Enacted by Laws 1895, ch. 65, § 6.

7.16.070. Contents of writ

The writ of review must command the party to whom it is directed to certify fully to the court issuing the writ, at a specified time and place, a transcript of the record and proceedings (describing or referring to them with convenient certainty), that the same may be reviewed by the court, and requiring the party, in the meantime, to desist from further proceedings in the matter to be reviewed.

Enacted by Laws 1895, ch. 65, § 7.

7.16.080. Stay of proceedings

If a stay of proceedings be not intended, the words requiring stay must be omitted from the writ. These words may be inset or omitted, in the sound discretion of the court, but if omitted power of the inferior court or office is not suspended or proceedings stayed.

Enacted by Laws 1895, ch. 65, § 8.

7.16.100. Service of writ

The writ may be served as follows, except where different directions respecting the mode of service thereof are given by the court granting it:

(1) Where it is directed to a person or persons by name or by his or her official title or titles, or to a municipal corporation, it must be served upon each officer or other person to whom it is directed, or upon the corporation, in the same manner as a summons.

(2) Where it is directed to a court, or to the judges of a court, having a clerk appointed pursuant to law, service upon the court or the judges thereof may be made by filing the writ with the clerk.

Enacted by Laws 1895, ch. 65, § 10.

7.16.110. Defective return – Further return – Hearing – Judgement

If the return of the writ be defective, the court may order a further return to be made. When a full return has been made, the court must hear the parties, or such of them as may attend for that purpose, and may thereupon give judgment, either affirming or annulling or modifying the proceedings below.

Enacted by Laws 1895, ch. 65, § 11.

7.16.120. Questions involving merits to be determined

The questions involving the merits to be determined by the court upon the hearing are:

(1) Whether the body or officer had jurisdiction of the subject matter of the determination under review.

(2) Whether the authority, conferred upon the body or officer in relation to that subject matter, has been pursued in the mode required by law, in order to authorize it or to make the determination.

(3) Whether, in making the determination, any rule of law affecting the rights of the parties thereto has been violated to the prejudice of the relator.

(4) Whether there was any competent proof of all the facts necessary to be proved, in order to authorize the making of the determination.

(5) Whether the factual determinations were supported by substantial evidence.

Enacted by Laws 1895, ch. 65, § 12. Amended by Laws 1957, ch. 51, § 6; Laws 1989, ch. 7, § 1.

IN THE SUPERIOR COURT FOR THE
STATE OF WASHINGTON
IN AND FOR PIERCE COUNTY

DCR, INC., a Washington corporation, and KATHY T. JOHNSON, Plaintiffs, v. PIERCE COUNTY, Defendant	)	NO. 94-2-03341-2 **DECLARATION OF RICHARD L. WILSON IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT**

RICHARD L. WILSON declares and certifies as follows:

1. I am an attorney admitted to practice in the states of Florida and Texas. The focus of my practice is First Amendment litigation, specifically representing nightclubs featuring live nude or topless entertainment. I have also been a legal and business consultant for several companies which provide this form of entertainment, including companies which operate adult nightclubs in several states. In this capacity, I am familiar with the business format of many clubs which feature live adult entertainment. I am familiar with business operations in clubs licensed to sell alcoholic beverages and clubs which are not. I am familiar with businesses which treat their entertainers as employees and those which treat entertainers as independent contractors. I have personally visited and spent a considerable amount of time in nightclubs in Seattle, Washington, as well as in Florida,

Georgia, Louisiana, Texas, Arizona, New York, Ohio, Tennessee, Texas, California, Minnesota, Illinois, Colorado, Utah, Pennsylvania, North Carolina, South Carolina, Missouri, Indiana, Mississippi, Alabama, Hawaii and other states.

2. Virtually all of the clubs that I have seen and/or am familiar with feature table dancing as the primary source of revenue for the entertainers. As used herein, "table dances" means dances which are performed at a customer's table, as opposed to dances performed on stage set back from the audience. Based on my experience in the industry, as well as my personal knowledge, it is my opinion and belief that table dancing is the primary entertainment activity provided by adult nightclubs, and that attracts customers to the clubs. Without table dances, entertainers would not be able to earn a living, and adult nightclubs would suffer severe financial losses and be forced to close, thus terminating their presentation of entertainment which is protected by the First Amendment.

I HEREBY DECLARE UNDER PENALTY OF PERJURY OF THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Dated this 25th day of March 1996 at Orlando, Florida.

/s/ Richard L. Wilson
RICHARD L. WILSON

WITNESS; LARRY GIBBS 3-21-96 (GILBERT LEVY)

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

DCR, INC., a Washington Corporation; and KATHY T. JOHNSON, Plaintiffs,	)	
vs.	)	NO. 94-2-03341-2
PIERCE COUNTY, Defendant.	)	

DEPOSITION UPON ORAL EXAMINATION

OF

LARRY W. GIBBS

10:00 a.m.

March 21, 1996

955 Tacoma Avenue South, Suite 301

Tacoma, Washington

Scott A. Kindle

Court Reporter

* * *

[p. 3] Q. Would you state and spell your name, please?

A. Larry William Gibbs, G I B B S.

Q. And your occupation, sir?

A. I'm a lieutenant with the Pierce County Sheriff's Department, so technically, I'm a deputy sheriff.

* * *

[p. 15] Q. (By Mr. Levy) When did you first hear that a new law, a new adult entertainment law, was being proposed to the council?

A. I can't remember that. It would be like I know in 93 we were talking about it. Late 93, early part of 94.

Q. When you say "we were talking about it," who were you referring to?

A. The people down in vice and the prosecutors that we were working with in court, and that because we were just getting totally frustrated over the nonexistence of the old law.

Q. As I understand it, and please correct me if I'm mistaken, there had been some rulings by the Pierce County District Court which affected your ability to enforce the old law?

A. That's a good way to put it, yeah.

Q. And when you say – when we use the phrase "the old law," we're talking about the Pierce County Adult Entertainment Ordinance that was in existence before the current law was passed?

[p. 16] A. That's correct.

Q. What is your understanding, sir, of the rulings of the Pierce County District Court which made it difficult for you to enforce the old law?

A. Well, we started off with – well, it all depends on how you want to look at it. We had a lot of different decisions, judgments made by different judges. And basically, every time we'd start for court, Jack Burns – I kind of refer to it as the Jack Burns machine, because he's very good, really, really excellent. And they'd come in there and they'd hit the judge with, you know, 20, 30 motions to dismiss, and it just basically kind of overwhelms them.

The end result was they started stripping the law away from us. And finally, we had one decision by a judge that basically said this is strictly civil, it has nothing to do with criminal activity, get it out of here. The other judges kind of jumped on it, and then we lost. But that was the end result of a year and a half of fighting in court.

Q. So when we're talking – now, the old law, as I understand it, was a law which required nude dancing to take place on a stage?

A. Yeah, nude dancing can only take place on a stage eighteen inches, and it had to be six feet away from [p. 17] customers, but that wasn't what our problem was.

* * *

[p. 25] Q. Do you have an opinion, based upon your experience, as to the extent of narcotics activity that was taking place in these businesses?

A. Oh, we found some drugs on some of the dancers, you know, when we'd catch them in violations, we'd take everyone back to the manager's office, and they'd all have little purses where they stuffed their

money in and a couple of times we found, you know, some minor drugs in their containers. But we didn't see a whole lot of drug [p. 26] activity going on.

Q. Any situations where dancers would attempt to sell drugs to customers?

A. Well, we were never really close enough to hear what they were talking about when they're sitting alongside of them and that. And like I said, my officers were not customers, so we didn't see that.

Q. And I assume that you also don't have information about efforts on the part of customers to sell drugs to dancers?

A. No, because like I said, we couldn't hear the conversations.

* * *

[p. 30] Q. Would I be accurate, then, in assuming that during your tenure with the vice section – excuse me, with SIU that you made no arrests of dancers for agreements to engage in off-premises prostitution?

A. I cannot recall an incident like that. Not to say that it didn't occur, but I can't recall anything.

* * *

Supreme Court, U.S.
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No. 99-220

In The
Supreme Court of the United States

DCR Inc. and KATHY T. JOHNSON,

Petitioners,

v.

PIERCE COUNTY,

Respondent.

On Petition For A Writ Of Certiorari To The
Washington Court of Appeals, Division II

RESPONDENT'S BRIEF IN OPPOSITION

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I.

JURISDICTION

The Washington State Court of Appeals, Division II, issued its decision on October 2, 1998. Thereafter, petitioner timely filed a petition for review with the Washington State Supreme Court which was denied on May 5, 1999.

Petitioner amended the original complaint to include claims under the Civil Rights Act, Title 42 United States Code Section 1983, for violation of the First and Fourteenth Amendments. Although plead through the amended complaint this court does not have jurisdiction as Petitioner argued at the state court level that Article 1, Section 5 of the Washington State Constitution afforded *greater* protection to Erotic Dancing than the First Amendment of the United States Constitution. App. 1. Thereby abandoning the federal claims. Petitioner was relying on a recent decision of the Washington State Supreme Court, Ino Ino , Inc. v. City of Bellevue, 132 Wn.2d 133, 937 P.2d 154, (1997), cert. denied, ___ U.S. ___, 118 S.Ct. 856, 139 L.Ed.2d (1998). Their argument was that requiring all dancing to occur on a stage 18 inches high and no closer than 10 feet to any patron (thereby eliminating table, lap and couch dancing) violated Article 1, Section 5 of the Washington State Constitution. That argument failed and now Petitioner attempts to resurrect the federal claims.

Petitioner has not met the requirement of Supreme Court Rule 14 (1) (g) (i). This court should not permit Petitioner to forum shop hoping for relief. This court should deny the Writ of Certiorari based on lack of jurisdiction.

II.

STATEMENT OF THE CASE

On March 15, 1994, the Pierce County Council adopted Ordinance No. 94-5.[1] CP 151. The ordinance was drafted by the Pierce County Prosecuting Attorney's Office at the request of law enforcement agencies, local citizens and members of the county council. The new law deals with "erotic dance studios" and involves what has routinely been called "topless clubs" in Pierce County.

Pierce County has a notorious history when it comes to topless clubs. In recent memory, Pierce County's Sheriff was involved in corruption and organized crime activities and ended up in federal prison after being convicted of racketeering and conspiracy charges involving topless establishments. Individuals used arson and intimidation to discourage competition in this lucrative field, and even tried to murder a liquor control agent. Eventually, the scandal helped change the form of government in Pierce County.

Violations of the adult entertainment code included illicit touching between dancers and patrons, dancers exposing their breasts and vaginal areas while hovering over patrons, rubbing patrons' crotches, simulating sex while sitting on patrons' laps and almost anything imaginable.

Violations were so common and outrageous that members of the Pierce County Sheriff's Department recorded these "couch & table dances" on videotape. Exhibit E to Pierce

---

[1] CP refers to Clerks' Papers, the record in the Washington State Court of Appeals, Division II.

County's Memorandum in Support of Motion for Summary Judgment is a brief sampling of dancer conduct captured on film at appellant's establishment (Fox's), & Deja Vu (dismissed out of the original suit on motion of Pierce County). CP 151, Exhibit E. The tape runs an abbreviated 8.5 minutes and was recorded in March of 1993. The first segment shows an individual at Deja Vu receiving a "couch dance" and giving money to the dancer. The second segment shows an individual at Fox's receiving a "table dance."

In vain, prosecutors tried to enforce the former ordinance, but local courts ruled there was no criminal penalty provision, and the only remedy was to try and suspend a dancer's license through the hearing examiner process. This proved futile as the former ordinance (which allowed off-stage dancing, and the direct exchange of money between dancer and patron) was inadequate, making enforcement efforts impossible.

At the public hearing conducted by the Pierce County Council when considering Ordinance No. 94-5, Pierce County Sheriff's Deputy Martin Kapsh testified that:

> ...and on several occasions, in three of the clubs again, I was propositioned for acts of prostitution, where I was told to go outside the club, the dancer would have to pay a bar fine to the particular club, to the manager, and in essence that was the money that the dancer would have made dancing while the dancer was in the club. The management would allow the dancer to leave with the customer, go to a motel room or

> to a house, be gone for an hour
> or two, and then come back.

CP 151, Exhibit B, page 31, lns. 19-26.

Deputy Paul Thrash testified that in a club that still operates in Pierce County numerous drug and sex violations were documented:

> During that point, that period of time, I was able to workup a case where we had over four or five different dancers where we were able to purchase just about any type of drug you would want. The predominant cases that we had were marijuana, methamphetamines, cocaine, and I believe on one instance we had a purchase for acid. Of those dancers that we had the purchases from, at the culmination of the investigation we were able to charge up to eighteen dancers with a myriad of violations of laws, not only the narcotics violations, but alcohol violations inside the club, which were prohibited at that time, prostitution, not only prostitution dances, I might add, but prostitution offers and agreements that were taking place outside of the club.

CP 151, Exhibit B, pg. 28, lns. 7-26.

Petitioner (DCR, Inc. and Kathy T. Johnson, subsequently referred to as DCR) claims that Pierce County's efforts to enforce the original Pierce County Adult Entertainment Ordinance ceased after the District Court held that there was no criminal penalty section. This is inaccurate as the County continued to try and enforce the existing ordinance by suspending dancers licenses through civil hearings, but this proved fruitless, as noncompliance was the rule not the exception.

After years of police work, failed enforcement efforts, and obvious noncompliance by the topless clubs, the Pierce County Prosecuting Attorney's Office, supported by local law enforcement and community members drafted Ordinance No. 94-5.

The crux of the ordinance attempts to separate dancer and patron by requiring all nude dancing to occur on a platform eighteen inches high and ten feet away from patrons. PCC 5.14.190(h). On stage dancers may still express themselves by dancing totally nude. Gratuities are still allowed, but tipping must be indirect (placed in a jar, etc.). PCC 5.14.190(k) (l).

In April, 1994, DCR and Johnson filed suit challenging the constitutionality of the ordinance in Pierce County Superior Court. CP 3. The matter was assigned to the Honorable Thomas Sauriol. CP 108-111. Following discovery, Pierce County moved for summary judgment on May 3, 1996. CP 151-193. DCR and Johnson also moved for summary judgment. After a full hearing, the trial court granted Pierce County's Motion for Summary Judgment and ordered that the preliminary injunction be dissolved. CP 788-791. On May 24, 1996, the trial court signed an amended order granting Pierce County's Motion for Summary Judgment.

In support of its motion for summary judgment Pierce

County submitted:

1. The transcript from the Pierce County Council hearing that was conducted before Ordinance 94-5 was adopted. Numerous law enforcement officers, citizens and elected officials testified in support of adoption of the ordinance. CP 151, Exhibit B.

2. A video tape taken at appellant's place of business, Foxes, (and at Deja Vu, a plaintiff that was dismissed out of the suit on motion of Pierce County) showing patrons receiving a "table" and "couch" dance. CP 151, Exhibit E.

3. Pierce County Sheriff's Department statistics from 1992 indicating that in 52 inspections conducted at adult entertainment establishments 40 arrests were made for violations of the law. Similar statistics from 1993 indicating that in 118 inspections conducted 76 arrests were made. CP 669, Exhibit A1-A4.

4. Twenty-three separate incident reports generated by Pierce County Sheriff's Department personnel documenting violations of the existing adult entertainment ordinance. CP 669, Exhibit B.

5. Statistics showing the number of calls made to the Pierce County Sheriff's Department for adult nightclubs in Pierce County. CP 669, Exhibit A5.

6. A Declaration of Pierce County Sheriff's Lieutenant Larry Gibbs indicating, among other things, that allowing table and couch dancing will result in continued violations of the law and illegal sexual contact between dancer and patron. CP 669, Exhibit C.

7. A citizen petition filed in support of Pierce

County Ordinance No. 94-5. CP 669, Exhibit D.

On May 15, 1996, DCR filed a Motion to Consolidate their appeal with Ino Ino, Inc. v. City of Bellevue. On May 15, 1996, the Washington State Supreme Court entered an order denying DCR's Motion to Consolidate.

On May 30, 1996, DCR filed a Motion for Stay of Enforcement and requested an emergency hearing and oral argument. On May 31, 1996, the Washington State Supreme Court entered an order denying a stay of enforcement and an emergency hearing. The Court considered the motion for a stay on July 9, 1996, without oral argument and ordered that the County shall not enforce Section 2 (h) of Ordinance 94-5. (All dancing shall occur on a platform intended for that purpose which is raised at least eighteen inches from the level of the floor and no closer than ten feet from any patron). The Court also ordered that in all other respects enforcement of the ordinance is not stayed.

DCR then filed an appeal in the Court of Appeals of the State of Washington, Division II, and on October 2, 1998, the Court of Appeals upheld the trial court and the constitutionality of PCC 5.14 in a published opinion, DCR, Inc. v. Pierce County, 92 Wn. App. 660, 964 P.2d 380 (1998). Petition for review was denied by the Washington State Supreme Court on May 5, 1999.

III.

REASONS FOR DENYING THE WRIT

1. The Issue of First Amendment Application to Erotic Dancing Has Been Repeatedly Decided.

There is no confusion as DCR claims over decisions involving adult entertainment ordinances that regulate distance

and other aspects of nude dancing. In Barnes v. Glen Theatre, Inc., 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991), this court upheld an Indiana public indecency law that resulted in nude dancers having to wear pasties and G-strings. The court decided that these requirements did not violate the First Amendment's guarantee of freedom of expression. In the case at hand, dancers are still allowed to perform totally nude and also allowed to receive tips from patrons (indirectly). Petitioners challenge the stage requirement (all dancing must occur on a stage 18 inches high and no closer than 10 feet to the nearest patron). This argument is not supported by the decision in Barnes.

A similar ordinance (but no tipping is permitted whatsoever) was upheld by the 9th Circuit Court of Appeals in Kev, Inc. v. Kitsap County, 793 F.2d 1053 (9th Cir. 1986). Recently, the City of Bellevue's adult entertainment ordinance was upheld by the Washington State Supreme Court in Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d. 133, 937 P.2d 154 (1998), cert. denied, ___ U.S. ___, 118 S.Ct 856, 139 L. Ed.2d (1998). The court found that Bellevue's eighteen-inch stage height requirement and four-foot separation between dancer and patron for off-stage performances was constitutional.

In the case at hand, the Court of Appeals stated that "Contrary to DCR's position, the Washington Supreme Court recently held that 'the differences in texts of art. I § 5, [of the state Constitution] and the First Amendment' do not 'justify] greater state constitutional protection in the context of sexually explicit nude and semi-nude dancing.' Ino Ino, 132 Wn.2d at 119-20. Courts have acknowledged that "[n]ude dance . . . is afforded lesser protections than other types of speech, such as political speech." See DFW Vending, Inc. v. Jefferson County, 991 F.Supp. 578, 590 (E.D. Tex. 1998) (citations omitted). Rather nude dancing is expression that "clings to the edge of constitutional protection.'" Ino Ino, 132 Wn.2d at 116 (quoting

JJR, Inc. v. City of Seattle, 126 Wn.2d 1, 9, 891 P.2d 680 (1992)). Although arguably "expressive," illegal conduct associated with table dancing, such as customers' digital penetration, oral copulation, insertion of tips into dancers' orifices, falls outside this edge of constitutional protection.

On November 1, 1996 the City of Kent's adult entertainment ordinance (similar to Pierce County's) was upheld by Federal District Judge Thomas S. Zilly. The court deemed the ordinance constitutional, rebuffing challenges brought by "topless clubs" based upon the First Amendment. Like Pierce County, Kent required a ten-foot separation between dancer and patron and a twenty-four inch stage height requirement (Pierce County's stage height requirement is eighteen inches). Colacurcio v. City of Kent, 944 F. Supp. 1470 (1996).

The Ninth Circuit Court of Appeals upheld Judge Zilly's decision on December 8, 1998, in Colacurcio v. City of Kent, 163 F.3d 545 (9th Cir. 1998). The court stated that "table dancing" is not a unique form of expression entitled to separate analysis under the First Amendment. The court stated, "We conclude that table dancing in private nightclubs, with documented links to prostitution and drug dealing, is a highly unlikely candidate for special protection under the First Amendment." Id. at 556.

2. Table Dancing, Lap Dancing, And Couch Dancing Are Not Unique Forms Of Expression Entitled To Special Protection Under The First Amendment.

Uniqueness alone is insufficient to trigger separate First Amendment protection. Colacurcio, 163 F.3d at 555. The Ninth Circuit held in Colacurcio that table dancing is not a unique form of protected expression that is qualitatively different from nude stage dancing and thus entitled to separate First Amendment analysis. Colacurcio, 163 F.3d at 554-56.

In assessing a First Amendment challenge, the court looked both to the private claims asserted in the complaint and the governmental interests protected by the enactment. "'A valid basis for according differential treatment to even a content-defined subclass of prescribable speech is that the subclass happens to be associated with...secondary effects' of the speech, so that the regulation is 'justified without reference to the content of the...speech.'" Colacurcio, 163 F.3d at 555-6, quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 389, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). The court found that table dancing in private clubs is not entitled to special protection under the First Amendment due to its documented links to the secondary effects of prostitution and drug dealing. Id. at 556. Seealso Acorn v. City of Phoenix, 798 F.2d 1260 (9th Cir. 1986) (upheld ordinance prohibiting the practice of distributing flyers and soliciting funds from automobile passengers stopped at red lights on justification of traffic control and public safety purposes); Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357, 117 S.Ct. 855, 866, 137 L.Ed.2d 1 (1997) (holding that public safety interests justified fifteen-foot "fixed buffer zone" separating abortion protestors from abortion clinics).

In the present case, the County has a substantial interest in preventing the secondary effects that often occur as a result of table dancing. The County presented evidence that investigations of law enforcement authorities revealed erotic dance studio problems with prostitution, narcotics, and sexual contact. The prohibitions in Acorn and Schenck were upheld even though they were analyzed under the rigorous standards applied to speech regulation in traditional public forums. The Ninth Circuit rejected appellants' attempt to apply a public forum analysis to table dancing, stating:

> Appellants' fluid definition of relevant forums, if carried to its logical conclusion, would

> require courts to subdivide audiences to the extent that any speech restrictive regulation would necessarily fail. . . . Appellant's theory would lead to the ironic result that forms of expressive conduct with documented connections to criminal activity would enjoy special constitutional protection. The district court was correct in rejecting this proposition. If forum analysis is relevant here, the appropriate forum is the entire cabaret. Even assuming that the audiences for table dancing and stage dancing are distinguishable, there is undoubtedly a high degree of overlap. The ten-foot distance requirement does not rob dancers of their forum or their entire audience.

Colacurcio, 163 F.3d at 556. Under the Ninth Circuit's reasoning, table dancing cannot be distinguished from stage dancing as a forum and cannot be designated unique for purposes of First Amendment analysis.

3. DCR Has Not Been Denied Access To The Nude Dancing Market.

The government has to effectively deny the business a "reasonable opportunity to open and operate" within the area in order for the courts to hold an ordinance unconstitutional. Colacurcio, 163 F.3d at 557, citing City of Renton v. Playtime

Theatres, Inc., 475 U.S. 41, 54, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). "In the absence of any absolute bar to the market...it is irrelevant whether [a regulation] will result in lost profits, higher overhead costs, or even prove to be commercially unfeasible for an adult business." Topanga Press, Inc. v. City of Los Angeles, 989 F.2d 1524, 1531 (9th Cir. 1993). The scope of permissible economic analysis is whether one is permitted to enter or participate in the market in the first instance, not whether a particular business will be able to successfully compete within the market. Spokane Arcade, Inc. v. City of Spokane, 75 F.3d 663, 666 (9th Cir. 1996). "Even if the costs of compliance were so great that [appellants] would be forced out of business, the ordinance[ ] do[es] not pose any intrinsic limitation on the operation of the [business]." Id. at 667.

In Colacurcio, the operators contended that their club in Bellevue, which was subjected a four-foot setback requirement, lost profits because the average number of dancers decreased, dancers quit, and fewer patrons purchased table dances. However, the court held that this was insufficient evidence to show that the ten-foot distance requirement would serve as an absolute bar to market entry in Kent. The court stated:

> Appellants have merely shown a potential loss in profits, which arguably could be remedied by restructuring the way they do business. The fact that Appellants hire their dancers on an independent contractor basis, refuse to pay their dancers for dancing on stage, require their dancers to pay rental fees, and limit their dancers' remuneration to tips from patrons, appears to us to be an effort to maximize

> profits while minimizing
> dancers' economic security.

Colacurcio, 163 F.3d at 557-8.

Similarly, DCR produced evidence that the industry practice is for dancers to pay the studio and a dancer's sole compensation is direct tips. The tipping restriction in the Ordinance does not prohibit all tipping; it merely prevents the patron from directly tipping the dancer in an effort to minimize the illegal secondary conduct such as prostitution and narcotics transactions, which often occur. Dancers can still receive tips indirectly through means such as a tip jar. In addition, DCR could restructure its business scheme so that profits could be earned despite the restrictions of the ordinance, a fact on which the Colacurcio seemed to rely. Moreover, courts have held that lost profits are irrelevant in the absence of any absolute bar to the market.

4. Pierce County Code Sections 5.14.070 And 5.14.240 Do Not Constitute Prior Restraints.

Pierce County Code 5.14.070 states that:

> The auditor shall issue an erotic dance studio license within 30 days of receipt of both the properly completed application and application fee, and upon finding that the business complies with all applicable fire, building, and zoning codes.

As noted in the decision by the Court of Appeals, ". . . we must construe an ordinance to uphold its constitutionality, if possible". State ex rel. Herron v. Browet, 103 Wn.2d, 215, 219,

691 P.2d 571 (1984). PCC 5.14.070 *requires* the Auditor to issue a license within 30 days of a properly completed application. If there are violations of safety or zoning codes the license would issue within 30 days after such violations were corrected.

DCR's argument taken to its illogical conclusion would require the Auditor to issue a license within 30 days even if there were uncorrected violations of the above referenced codes. This is not supported by Worldwide Video v. City of Tukwila, 117 Wn.2d 382, 816 P.2d 18 (1991).

Baby Tam & Co. v. City of Las Vegas, 154 F.3d 1097 (9th Cir. 1998), holds that a licensing scheme . . . must provide an avenue for prompt judicial review . . . and a prompt decision by a judicial officer. DCR's reliance upon Baby Tam & Co., is misplaced as PCC 5.14.270 affords a prompt review (90 days) and PCC 1.22.120 requires a decision within 10 days. App. 2.

DCR contends that PCC 5.14.070 is a prior restraint because the Pierce County Ordinance provides an aggrieved applicant for a license an administrative hearing within 90 days, after an adverse decision by the auditor, rather than 20 days. DCR relies upon Worldwide Video v. City of Tukwila. In that case, the Washington State Supreme Court upheld the peep show licensing ordinance adopted by the City of Tukwila. The City Clerk is required under the Tukwila ordinance to issue the licenses, or the reasons for non-issuance, within 30 days after the date of filing of an application. The 30-day period is intended to provide time for various necessary investigations by the police department, health department, etc. PCC 5.14.070 also has a 30-day time limitation and includes a finding that the business complies with all applicable fire, building, and zoning codes. In Worldwide Video, the court stated that the 30-day maximum approval period in TMC 5.52.080(a) is constitutional. The court stated that 30 days is not necessarily too long a period, given the

various inspections and investigations which must take place before licensing. It distinguished FW/PBS v. City of Dallas, 493 U.S. 215, 110 S.Ct. 596, 197 L.Ed.2d 603 (1990) where the United States Supreme Court invalidated a licensing requirement passed by the City of Dallas because it provided no means by which an applicant might ensure that the business be inspected within the 30-day time period. Its disapproval of the Dallas ordinance was instead based on the absence of any remedy if the city failed to issue a license within those 30 days. The court in Worldwide Video, noted that the Supreme Court did not find the 30-day period inherently problematic. The problem was that there was not an appropriate remedy if the city failed to issue a license within the 30 days. This is not the case with Pierce County Ordinance No. 94-5.

PCC 5.14.070 must be read with PCC 5.14.240 which reads in its entirety:

5.14.240 Appeal and Hearing.

A. Any applicant/licensee that has had a license denied, revoked or suspended by the Auditor shall have the right to appeal such action to the Pierce County Hearing Examiner, by filing a notice of appeal with the Auditor within ten working days after receiving notice of the action. The matter shall be heard within ninety days by the Hearing

Examiner, unless the parties agree otherwise.

B. The filing of an appeal by an applicant/licensee shall stay the action of the Auditor, pending a resolution of the matter.

C. The decision of the Hearing Examiner shall be based upon a preponderance of the evidence.

D. The burden of proof shall be on the Auditor.

E. The decision of the Hearing Examiner shall be final unless appealed to Superior Court within ten working days from the date the decision is entered by filing an appropriate action and serving all necessary parties.

PCC 5.14.240(a) provides that an applicant that has had a license denied, revoked or suspended by the auditor has the right to appeal such a decision to the Pierce County Hearing Examiner and the matter must be heard within 90 days unless the parties agree otherwise. Further, section (e) states that the decision of the hearing examiner shall be final unless appealed to the Superior Court within 10 working days from the date the decision is entered by filing an appropriate action and serving all parties necessary. Section (b) indicates that the filing of an appeal by an applicant or licensee shall stay the action of the auditor *pending a resolution of the matter*. As pointed at by the

Court of Appeals, PCC 5.14.240 provides for a stay until the appeal process is exhausted.

In Worldwide Video, the court upheld Tukwila's code because a hearing had to take place within 20 days, the filing of such appeal stayed the action of the clerk, and the decision of the hearing body may be appealed to the superior court. The court continued "as long as these procedures for appeal are not used as a means of unreasonably delaying issuance of licenses, they are sufficient to satisfy the test in FW/PBS v. City of Dallas.

In the case at hand, DCR's only argument is that rather than a 20-day appeal period, Pierce County has provided for a 90-day appeal period, with all other code provisions being identical to the one upheld in Worldwide Video. This argument is weak at best. Ninety days in a judicial context or setting is not extensive, and was included to accommodate the realization that an adequate amount of time to process appeals is necessary. It is important to note that any action taken is stayed pending the outcome on appeal.

DCR contends that PCC 5.14.070 and 5.14.240 are prior restraints because there is no time limit for the completion of administrative review conducted by the hearing examiner. PCC 1.22.120 states that all decisions of the hearing examiner shall be rendered within 10 working days following the conclusion of all testimony and hearings and closing of the record unless a longer period is mutually agreed to by the applicant or appellant and the examiner.

IV.

CONCLUSION

DCR has not cited one case that would invalidate Pierce County Ordinance 94-5, to the contrary the existing case law up-

holds a municipalities' authority to separate dancer from patron.

This court in Barnes allowed an Indiana public decency law that required panties and G-strings in nude dancing establishments to stand. The Ninth Circuit Court of Appeals relying on Barnes upheld an almost identical statute to 94-5 in Colacurcio.

DCR's petition should be denied.

DATED this 28 day of September, 1999.

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No. 21446-4-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

DCR, Inc., a Washington corporation;
and KATHY T. JOHNSON,

Appellants,

v.

PIERCE COUNTY,

Respondent.

APPEAL FROM PIERCE COUNTY SUPERIOR COURT

PETITION FOR REVIEW

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Appendix "1"

I.

IDENTIFY OF PETITIONERS

The Petitioners are the DCR, Inc. and Kathy T. Johnson, the appellants in the Court of Appeals.

II.

COURT OF APPEALS DECISION

Petitioners are seeking review of the decision of the Court of Appeals, Division II, in DCR, Inc. and Kathy T. Johnson v. Pierce County, ___ Wn.App. ___, 964 P.2d 380 (1998), that was filed on October 2, 1998. The Petitioners timely filed a motion for reconsideration. The order denying the motion for reconsideration was entered on November 24, 1998.

III.

ISSUES PRESENTED FOR REVIEW

A. The first issue is whether the Court of Appeals decision holding that Pierce County's absolute ban on table dancing is not a prior restraint conflicts with this Court's decision

in Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 937 P.2d 154 (1997).

B. The second issue is whether the Court of Appeals neglected to follow established First Amendment case law in holding that the Pierce County Ordinance is narrowly tailored in furtherance of a substantial governmental interest.

C. The third issue is whether the Court of Appeals failed to follow this Court's decision in Ino Ino, Inc. v. City of Bellevue, supra, in deciding that economic impact evidence is irrelevant to the determination of whether Pierce County's Adult Entertainment Ordinance leaves open ample alternative avenues of communication.

D. The fourth issue is whether PCC §§ 5.14.070 and 5.14.240 are an impermissible prior restraint because there are no time limits for issuance of a license, no provision for a prompt administrative hearing, and no provision for a prompt judicial decision.

Appendix "1"

Chapter 1.22

PIERCE COUNTY HEARING EXAMINER CODE

1.22.120 Examiner's Decision

A. When the Examiner renders a decision he or she shall make and enter findings of fact from the record and conclusions of law thereof which support such decision. The findings of fact shall be supported by substantial evidence in the record and the conclusions of law shall be based upon the policies of the applicable Comprehensive Plan, Shoreline Master Program, Subdivision Regulations, Environmental Regulations; the standards set forth in the various land use regulatory codes of the County or any other relevant plan, regulation, Federal or State law, case law, case specific Shorelines Hearing or Growth Management Hearing Board decisions, or any other applicable law.

B. All decisions of the Examiner shall be rendered within ten working days following the conclusion of all testimony and hearings and closing of the record, unless a longer period is mutually agreed to by the applicant or appellant and the Examiner. Upon issuance of the Examiner's decision, the Examiner shall transmit a copy of the decision by certified mail to the applicant or appellant and by regular mail to other parties of record.

(Ord. 96-19S § 4 (part), 1996; Ord. 94-112S § 1 (part), 1994; Ord. 90-154 § 1 (part), 1990; Res. 20489, 1978)

Appendix "2"

Supreme Court, U.S.
FILED
OCT 12 1999
OFFICE OF THE CLERK

No. 99-220

In The

Supreme Court of the United States

DCR, INC. and KATHY T. JOHNSON,

Petitioners,

v.

PIERCE COUNTY,

Respondent.

On Petition For A Writ Of Certiorari To The Washington Court Of Appeals, Division II

PETITIONERS' REPLY BRIEF

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REPLY TO ARGUMENT ON JURISDICTION

Both in the trial court and on appeal, Petitioners alleged that the challenged provisions of the Pierce County Ordinance violated the free speech clauses of both the federal and state constitutions. The Washington Court of Appeals acknowledged this in the introductory portion of its written decision, stating:

> On appeal, DCR and Johnson claim the trial court erred in summarily dismissing their case, because there are genuine issues of material fact concerning the constitutionality of Pierce County Ordinance 94-5, *involving the First, Fifth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 5, of the Washington Constitution.*

See, Petition at App. 6 (emphasis supplied).

Moreover, the Court of Appeals specifically rested its decision on both federal and state constitutional grounds. In addressing the question of whether the so-called ten-foot rule had an impact on expression, the Court of Appeals stated:

> We therefor hold that proximity is not an expressive component of erotic dance entitled to protection *under either the First Amendment or the State Constitution.*

See, Petition at App. 13 (emphasis supplied).

In spite of Respondent's unfounded claim to the contrary, Petitioners have unmistakably complied with the jurisdictional requirement of Supreme Court Rule 14(g)(1).

REPLY TO RESPONDENT'S STATEMENT OF THE CASE

While there was undoubtedly testimony in the legislative record reflecting in part the parade of horribles referred to by Respondent in its statement of the case, it was equally clear from the evidence presented to the trial court, that much of the material inserted in the record before the County Council was either greatly exaggerated or false. Thus, Lieutenant Larry Gibbs, who commanded the unit responsible for enforcing the prior adult entertainment ordinance, testified in his deposition that there was minimal evidence of drug deals and prostitution.[1] In addition, the procedural history of the case belies Respondent's claim that the adult nightclubs in Pierce County, Washington, are the second coming of Sodom and Gomorrah. At the time that the complaint was filed in the trial court in April, 1994, Respondent stipulated to the entry of a preliminary injunction preventing the County from enforcing the challenged ordinance pending the outcome of the litigation. The case then languished in the trial court for nearly two years before Respondent filed its summary judgment motion in January, 1996. The point here is simply that if the adult nightclubs in Pierce County, Washington represented the grave threat to public health and safety that Respondent's statement of the case now seems to suggest, Respondent would never

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[1] In his deposition, Lieutenant Gibbs was asked how the challenged ordinance would prevent anyone from making payoffs to the public officials, and he candidly replied, "How would it prevent someone from making – give me a break. I mean anyone can attempt to make a payment to an officer, you know, they have no control over that". Gibbs Deposition at 58.

have agreed to the entry of a preliminary injunction and would never have allowed the case to sit on the "back burner" for so many months before seeking disposition of the matter.

Assuming for the sake of argument however that the Pierce County adult nightclubs are a hot bed of organized crime, bribery of public officials, drug deals, and prostitution, Respondent fails to explain what this has to do with the ban on table dancing. On its face, the Ordinance apparently is not designed to put the clubs out of business nor does it prevent the dancers from sitting with patrons, and discussing whatever subject they may choose to discuss, including, for example, drug dealing or prostitution. In this case, the Ordinance targets a particular form of expression without any suggestion by Respondent that the restriction imposed by the regulation will alleviate the problems Respondent refers to in its statement of the case. Several lower courts have held that there must be at least some rational connection between the factual justification in the legislative record and the particular restriction imposed. *See*, for example, *Tollis, Inc. v. San Bernardino County*, 827 F.2d 1329 (9th Cir. 1987); *N.W. Enterprises, Inc. v. City of Houston*, 27 F.Supp.2d 754 (S.D. Tex. 1997); *World Wide Video, Inc. v. City of Tukwila*, 117 Wn.2d 382, 816 P.2d 18 (1991). At least with respect to the more scandalous claims set forth in Respondent's statement of the case, there is no such connection.

REPLY TO RESPONDENT'S CLAIM THAT THE ISSUE OF FIRST AMENDMENT PROTECTION FOR EROTIC DANCING HAS BEEN REPEATEDLY DECIDED

A primary question unresolved by this Court's decision in *Barnes v. Glen Theatre, Inc.*, 475 U.S. 41 (1991), is how to decide which components of erotic expression are entitled to First Amendment protection. The plurality in *Barnes* assumed that nudity per se was not a critical part of the dancer's erotic expression such that the regulation's ban on total nudity was not judged by the same maximum level of scrutiny that this Court typically reserves for content-based restrictions.[2] This Court has yet to decide whether governmental restrictions on other components of the dancer's erotic expression, such as proximity to the patron, are to be judged by the same deferential standard found to be appropriate in *Barnes*. The Court of Appeals in this case and the Ninth Circuit in *Colacurcio v. Kent*, 163 F.3d 545 (9th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3008 (June 23, 1999) (No. 98-205), held without specific direction from this Court that restrictions on proximity should be measured against the lowest level of scrutiny, assuming that First Amendment protection was applicable at all.

Petitioners respectfully submit that approach taken by the lower courts amounts to unprincipled, piecemeal

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[2] Typically, content-based regulations are subject to the most exacting scrutiny. *Boos v. Barry*, 485 U.S. 312, 321 (1988). They must serve a "compelling governmental interest", and they must constitute the "least restrictive means to further the articulated interest". *Id.* and *see*, also *Sable Communications v. FCC*, 492 U.S. 115, 126, 106 L.Ed.2d 93, 109 S.Ct. 2829 (1989).

adjudication of free speech claims, which inevitably leads to the general erosion of First Amendment safeguards. This situation has arisen in part because this Court has yet to articulate a standard for deciding whether a particular component of erotic dance is central or peripheral to the core of protected expression, and it has yet to say whether a complete ban on an essential part of that expression should be judged by either a strict or deferential standard. Petitioners are seeking certiorari in order to have these important questions resolved.

REPLY TO ARGUMENT THAT PETITIONERS ARE SEEKING SPECIAL FIRST AMENDMENT PROTECTION

It is fundamentally wrong to characterize Petitioners' claim as one seeking "special" First Amendment protection. More accurately, Petitioners maintain that table dancing is entitled to the First Amendment protection. While the Ninth Circuit in *Colacurcio v. Kent* may have skirted the issue by characterizing the claim as one which sought special First Amendment protection for table dancing, the Washington Court of Appeals was much more forthright and candid in holding that table dancing is not entitled to any First Amendment protection at all.[3] In reality, the question is whether a court is entitled to completely deprive a particular form of expression of constitutional protection, because the expression is

[3] The Court of Appeals stated, "Having found that proximity is not constitutionally protected expression, aside from the performance of the dance itself, we need not address DCR's prior restraint argument." *See*, Petition at App. 13.

believed [by the court] to be associated with so-called secondary effects, and because the expression, in the court's estimation, is devoid of social value. This is the net effect of the Court of Appeals' holding in this case and the holding of the Ninth Circuit in *Colacurcio*.

The secondary effects doctrine as articulated in *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 91 (1986) was developed as a means by which a court could determine whether a regulation applicable on it face to a particular form of expression, was content-neutral or content-based. This in turn would determine whether a court was to apply strict scrutiny or time, place and manner analysis. However, the Washington Court of Appeals in this case, and the Ninth Circuit in *Colacurcio*, have taken the doctrine a step further by saying that if a certain form of expression happens to be associated with secondary effects, then that ends the inquiry, and the expression is unprotected. In essence, the Washington Court of Appeals and the Ninth Circuit have carved out a bold new exception to the First Amendment in order to evade the obvious problem that the ten foot rule is a complete ban on a particular form of expression and therefor application of time, place and manner analysis does not save the regulation.[4] The novel question for this Court is whether the carving out of this new exception is proper, given that it is ultimately based on the lower court's

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[4] This Court has repeatedly held that a regulation which completely forecloses an entire medium of expression does not pass muster under the time, place and manner test. *City of Ladue v. Gilleo*, 512 U.S. 43 (1994); *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Jamison v. Texas*, 318 U.S. 413 (1943); *Schad v. Mt. Ephraim*, 452 U.S. 61 (1981).

subjective, ad hoc determination that a particular form of expression is so lacking in social value that it should not be protected.

REPLY TO ARGUMENT THAT PETITIONERS HAVE NOT BEEN DENIED ACCESS TO THE NUDE DANCING MARKET

Petitioners are seeking certiorari because the Ninth Circuit's "market entry" test is devoid of meaning and because this Court has yet to say whether and under what circumstances economic impact evidence is relevant in resolving a First Amendment claim. The Ninth Circuit implied in *Colacurcio v. Kent* that if the petitioners presented evidence to the trial court sufficient to show that the "ten foot rule" would put them out of business under any possible business format, then they might have prevailed. 163 F.3d at 557-558. However, there is no controlling case law which tells litigants with certainty that this is the burden which they must sustain, and the Washington Court of Appeals held to the contrary in stating that adverse economic impact is completely irrelevant so long as the regulation does not amount to an outright ban.[5] This Court should grant certiorari to provide a clear and

[5] The Court of Appeals stated, "Where government actions have not overtly denied adult businesses the ability to open and operate, but have merely made it more difficult to earn a profit, there has been no governmental elimination of alternative avenues of communication, and no denial of the First Amendment right of free speech or expression." *See*, Petition at App. 25.

controlling answer to a question concerning which the lower courts have failed to provide guidance and standards.

REPLY TO ARGUMENT THAT THE SECTIONS OF THE PIERCE COUNTY CODE WHICH GOVERN LICENSING DO NOT CONSTITUTE AN IMPERMISSIBLE PRIOR RESTRAINT

Contrary to Respondent's suggestion at page 14 of its Brief In Opposition, Petitioners are not arguing that erotic dance studio licenses must be issued in thirty days, regardless of uncorrected code violations. Petitioners are arguing that this Court's decision in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) requires the licensor to issue *or deny* the license within a reasonable period of time. In contrast to what is mandated by *FW/PBS*, Pierce County Code (hereafter PCC) § 5.14.070 obligates the auditor to do neither if it is determined, in his or her discretion, that the violation is not "readily ascertainable". According to *FW/PBS*, if an applicant fails to insure that it has complied with other applicable codes before seeking to obtain an erotic dance studio license, it should bear the risk of denial, but not of infinite delay.[6]

[6] In Pierce County, one must obtain a building permit and certificate of occupancy in the event of structural modifications. This insures compliance with zoning building and fire codes. However, like the Dallas Ordinance that was considered in *FW/PBS*, the Pierce County Ordinance 94-5 requires reinspection regardless of whether the applicant previously has obtained a certificate of occupancy.

In the event of license denial, an unsuccessful applicant may file an appeal to the hearing examiner, and obtain an administrative hearing within ninety days. *See*, PCC § 5.14.240(A). The Hearing Examiner is required to render a decision within ten days of the hearing. *See*, Respondent's Opposition Brief at App. 1. Thereafter, if the applicant is unsuccessful in reversing the auditor's decision, it may seek judicial review by means of a statutory writ. However, the writ statute fails to provide for a prompt judicial hearing. The potential delay of one hundred days before the hearing examiner is required to make a decision, coupled with the absence of a requirement of a prompt judicial hearing, means that that unsuccessful license applicant may remain in limbo for months and months, even if it is destined to prevail. This fails to satisfy the *FW/PBS* requirement of prompt judicial review.[7]

The stay provision in PCC § 5.14.240(B) merely stays the decision of the auditor, it does not permit the business to begin operations in the event of license denial, or to remain open in the event of non-renewal.[8] Under these circumstances, the status quo is that business is closed, pending the outcome of administrative and judicial

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[7] To the extent that the opinion of the Washington Supreme Court in *World Wide Video v. Tukwila*, 117 Wn.2d 382, 816 P.2d 18 (1991) requires a different result, it is in direct conflict with this Court's decision in *FW/PBS*.

[8] PCC § 5.14.080 provides that the license expires automatically on December 31 and there is nothing in the ordinance which permits the business to remain open pending the decision of the auditor on the renewal application, or pending exhaustion of administrative and judicial appeals.

review. This is contrary to the rule against prior restraints as set forth in *Freedman v. Maryland*, 380 U.S. 51 (1965), and *FW/PBS*. The Brief In Opposition glosses over these fundamental problems, and argues contrary to established precedent that the First Amendment sanctions these uncontrolled procedure delays.

CONCLUSION

This Court should issue the writ of certiorari to the Washington Court of Appeals.

Respectfully submitted,

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